4.2.12
WC: 191694

Shooting Foul Shots in the Boston Garden

4.2.12
WC: 191694

Throwing out first pitch at Fenway for my birthday and having sandwich named after you at Bleacher Bar

4.2.12
WC: 191694

Years later, after Anatoly, now Natan, became a leading political figure in Israel, we were both invited to speak at the celebration of Israel's 60th birthday. Many world leaders were also invited. One of the events was held in the Inbal Hotel in Jerusalem.

I got into the elevator and by coincidence both Mikael Gorbachov and Sharansky got into the same elevator. Gorbachov recognized us (I had met him in Moscow during one of my human rights trips while he was the Chairman of the Communist Party and the head of state). He pointed at me and said to Sharanksy: "He's a good lawyer, but I'm an even better lawyer." Sharansky replied, "But he got me out of the Soviet prison." Gorbachov smiled and said "I got you out. He helped, but without me you would have sat longer." We all got a good laugh and shook hands.

4.2.12
WC: 191694

Claus Von Bulow

After we won the case, Claus and his then girlfriend decided to host a dinner party. I told them I would not come if it was a victory party, since I have a policy of not going to victory parties of criminal defendants. He assured me that it was merely a dinner for several interesting people. He told me among his other guests would be the novelist Norman Mailer and his wife. When the dinner began, Claus regaled everybody with stories from the trial and I explained why the evidence seemed to point to his innocence. About halfway through the dinner, Mailer grabbed his wife's arm and said, "Let's get out of here. I think this guy is innocent. I thought we were going to be having dinner with a man who actually tried to kill his wife. This is boring." In fact, many of my most exciting cases involved very boring people, though Claus was not one of them. When the movie came out, Claus refused to go to see it insisting that he would never watch Jeremy Irons play him. Several months later I was having lunch with Claus and his most recent girlfriend who I had never previously met. After about an hour of conversation with me, she turned to Claus and said, "Now that I've met Alan I believe that Ron Silver really didn't do him justice. He overplayed him." Claus immediately shook his head in agreement saying, "You're right my dear, I too think he overplayed him." This from a man who claimed he didn't see the film.

4.2.12
WC: 191694

The killing of John Lennon

Another death for which I have long felt some responsibility was the murder of John Lennon by Mark Chapman in 1980. Lennon was in the United States on that fateful day because I helped him avoid deportation back to England in 197_. Had our legal team not been successful in stopping the Nixon Administration's efforts to deport Lennon on trumped up allegations relating to his use of marijuana in England, Lennon would have been deported and banned from the United States. It is highly unlikely (though not impossible) that Chapman would have stalked and shot him on the streets of London or Liverpool, as he did on Central Park West in New York.

I was retained by an excellent deportation lawyer named Len Wildes to write a legal memorandum on the impropriety of the deportation request. (My fee was to be a record album signed by John Lennon: Lennon signed it; Wildes lost it; and my children nearly killed me!) We won the case and Lennon continued to live in Dakoda for the ___ years before he was killed.

His killer, Mark Chapman, had no money to hire a lawyer and so the court appointed a former student of mine and friend Jonathan Marks, to represent him. Marks is a brilliant and innovative lawyer who wanted to raise a defense based on Chapman's mental state. He asked me to consult with him on the case, but I didn't feel comfortable helping a defendant who had killed my former client. So I declined.

Several years later, I happened to run into Yoko Ono at an art auction. I told her how sad I was that we had won the deportation case, because if we had lost, John would still be alive. She became angry at what I had said: "Don't ever think that," she admonished. "Those ___ years were the happiest in his life and mine. He gave me John Ono. You did a good thing." She reached over, kissed me and thanked me. I still feel somewhat responsible for what happened on that awful day in front of the Dakoda.

4.2.12
WC: 191694

Mazoltuv Borukhova

In February 2011, I argued the appeal of Mazoltuv Borukhova, whose murder conviction became the basis of Janet Malcolm's best seller, *Iphigenia in Forest Hills: Anatomy of a Murder Trial*. Borukhova, a young doctor who recently immigrated from Bukhara in the former Soviet Union, was involved in a hotly contested divorce and custody suit with her dentist husband, who had also immigrated from Bukhara. Mazoltuv was accused of hiring a cousin from the State of Georgia to come up to Queens and murder her husband. She was convicted and sentenced to life imprisonment. The major issue on appeal was similar to the one that resulted in the reversal of Sandra Murphy's conviction, namely a hearsay statement, testified to by the murder victim's father, describing a statement allegedly made by the murder victim that suggested he feared being killed by his estranged wife. The court ruled that this statement should not have been admitted into evidence, but that the other evidence presented to the jury was so overwhelming, that the error of admitting the hearsay was "harmless"—that means that the jury would have convicted Borukhova even if they had never heard this inadmissible evidence. Appellate courts are not really in a good position to evaluate what a jury would have concluded if certain evidence had been excluded. The case is now on habeus corpus.

4.2.12
WC: 191694

Gigi Jordan

I am currently representing a woman named Gigi Jordan, who admittedly killed her 8 year old severely autistic child and tried to take her own life at the same time. There is considerable evidence that her child was being sexually abused by his biological father and Gigi was in great fear that her former husband was trying to kill her. If he succeeded, she believed that her autistic child would be left at the mercy of his sexually abusive father. Gigi decided that this horrible choice of evils required her to protect her child in the only way she knew how: by ending his life along with hers. We are in the process of preparing for her trial.

4.2.12
WC: 191694

Leona Helmsley

Leona Helmsley was not a good client. She too was boring and rather stupid. She was called the queen of mean, and I can only disclose incidents that occurred in public. Here's one that shows how she earned her title. We were having breakfast in the dining room of her hotel, when a waiter brought me a cup of tea. She noticed, but I didn't, that a little bit of the tea had dripped onto the saucer. It was certainly no big deal. When she saw it she grabbed the tea and the saucer and threw it on the floor in the direction of the waiter, shattering it into many pieces. She then screamed at the waiter, "Now clean it up and beg me for your job." I simply walked away, not wanting to be associated with that kind of public rudeness.

When my daughter was born, Leona had her private jet fly a large stuffed bear to Boston, where it was placed in a limo and brought to our home. My daughter loved the bear and several years later had an opportunity to thank Leona for sending it. Leona replied: "It's stolen merchandise. I stole it from Donald Trump." She then explained how she had sold a hotel to Trump that included a pastry restaurant called Rumplemyers, which was decorated with large stuffed animals. The sale included the stuffed animals, but Leona took the bear, which belonged to Trump, and sent it to my daughter. I told Leona that I would either have to return the stolen bear or get Trump's permission to keep it. She said, "tell the Donald I stole it from him. See what he says." I told Trump. He laughed and said "I'm not surprised. Let your daughter enjoy the bear."

One day my brother, who was another of her lawyers, was invited to a birthday party at her house. He brought my mother along. Leona knew that my mother did not want to be confronted with the reality that my brother is not kosher outside of his house. My brother, sensitive to this, always eats only kosher food in her presence. He was on line with my mother at the buffet choosing among the smoked salmon and vegetables when Leona came over to my mother and brother and in her booming voice yelled, "In front of your mother you eat salmon. In front of me you eat lobster. Ha ha ha." It was entirely gratuitous, hurtful and all too typical.

Although my brother and I—who were her appellate lawyers—saved Helmsley several years imprisonment by winning the state appeal—Helmsley refused to pay our final legal bill. We should have demanded up front payment for all our services because she had a reputation for "negotiating" all of her bills. ("I'll give you 25 cents on the dollar. If you don't like it, sue me!") My brother eventually sued her but dropped the suit after she said she would spend "a large fortune beating him into the ground."

Once when we were waiting to go to court, Leona told me a joke about two competitive Russian neighbors who hated each other. One day, the first one tripped over a lamp and a genie popped out. "You get the usual three wishes, but here's the catch: everything you ask for and receive, your neighbor gets double." He asked for a thousand rubies, and the next day the neighbor boasted, "I got 2,000 rubies." He asked for a beautiful woman, and the neighbor bragged he got two women. Finally, in frustrations he asked the genie, "Would it be too painful to cut off one of my testicles?"

4.2.12
WC: 191694

That, in a nutshell, was Leona Helmsley. She cared more about hurting others than helping herself.

4.2.12
WC: 191694

Being mentored by Elie Wiesel

Since the beginning of my career, Elie Wiesel—the world's most famous and influential Holocaust survivor—has served as a guide, mentor and friend. I have sought his advice on many issues, and he has sought mine.

As a professor of public law, I get to nominate candidates for the Nobel Peace Prize. In 1986, I nominated him. In my letter of nomination, I wrote the following:

> No one in the world today deserves the Nobel Peace Prize more than Elie Wiesel. Professor Wiesel represents the survivors of the most massive genocide ever perpetrated on a segment of humankind—with the implicit approval of so many bystanders. It is particularly disappointing that the Nobel Peace Prize Committee—which, because of its North European heritage, in some sense represents a portion of these bystanders—has never seen fit to recognize Professor Wiesel's contribution to peace.
>
> To understand Professor Wiesel's unique and immeasurable contribution to peace, one must only imagine how it might have been without a Wiesel. It is impossible to imagine the rage that must be continually experienced by direct and indirect survivors of the Holocaust. Other victims have responded by non-peaceful means—for example, the continuing violence of some Armenians against Turks. Jewish survivors have not. There has been no terrorism against innocent Germans—or even guilty Germans who live in luxury and sometimes in honor. For this alone, the Jewish survivors as a group deserve recognition for their contribution to peace.
>
> Professor Wiesel's role in helping to shape the attitude of the first and second generations of survivors is, of course, widely acknowledged.
>
> There are many excellent reasons for recognizing Professor Wiesel. But none is more important than for his role in teaching survivors and their children how to respond in constructive peace and justice to a worldwide conspiracy of genocide, whose complicitous components included mass killing, mass silence, and mass indifference. Professor Wiesel has devoted his life to teaching the survivors of a conspiracy which excluded so few, to reenter and adjust in peace to an alien world that deserved little forgiveness. He has also taught the rest of the world the injustice of silence in the face of genocide. Wiesel's life work merits the highest degree of recognition—especially from representatives of the world that stood silently by.

In an article several years later, I urged the Nobel committee to use Elie Wiesel as its model for selecting future Nobel Prize winners. This is part of what I wrote:

> Many of the Nobel Peace Prize winners were recognized by the Nobel Committee for their work on behalf of their own people: Most recent winners - Rigoberto Menchu of Guatemala, Aung San Suu Kyi of Burma, the Dalai Lama of Tibet, Bishop Desmond Tutu of South Africa, Lech Walesa of Poland - were honored primarily for

> helping their own people, and they have continued to try to help their people.
>
> Elie Wiesel's work is far more universal. For example, those who have suffered most in the former Yugoslavia have been the Croats and the Muslims. It was they who Elie Wiesel risked his life to protect. Yet during the Holocaust, which took the lives of 6 million of Wiesel's people, the Croats were among the most barbarous hands-on perpetrators of genocide against Jewish babies, women and men. The Islamic world has been in conflict with Elie Wiesel's people over Israel, and many innocent Jews have been murdered by Islamic co-religionists of Muslims who have been terrorized in Sarajevo. Yet, Wiesel makes no distinctions based on religion, race, creed or even enmity against his own people. He will bear witness, even at the risk of his life, to the suffering of any human beings, so long as they are not the aggressors.
>
> To be sure, Elie Wiesel speaks up on behalf of his people as well, with a voice of unparalleled eloquence.
>
> …
>
> A great Jewish sage once wrote, "If I am not for myself, who will be for me? But if I am for myself alone what am I? And if not now, when?" Elie Wiesel lives by that tripartite philosophy. He is the voice of the Jewish people - their international moral spokesman. But he speaks not for Jews alone; instead, he can be counted to combat hatred and bigotry regardless of who the victims may be. And for Elie Wiesel, tomorrow is never an excuse for not acting today.

Over the years, we have worked closely together on issues relating to Soviet dissidents, the Armenian genocide, the massacres in Rwanda and Darfur, efforts to delegitimate Israel and other human rights concerns. I have sought his advice on many occasions, and it has always been wise and useful.

In 1982, Elie was asked to present me with the William O. Douglas Award by the Anti-Defamation League. In presenting the award, he paid me the highest compliment: "If there had been a few people like Alan Dershowitz during the 1930's and 1940's, the history of European Jewry might have been different." Although I have always believed that these words were highly exaggerated—no one could have stopped Hitler's maniacal determination to kill the Jews of Europe—I have tried to hold myself up to his expectations of me. I recall his words every time I think of slowing down or doing less to protect the victims of human rights abuses.

In 19__, Elie and his wife, Marianne, invited me to their home in New York for an intimate dinner with French President, François Mitterrand. Elie and his wife speak fluent French but I do not and neither did the two other couples at the dinner. Mitterrand spoke passable English but he insisted on conducting the entire conversation in French, with a British translator at his side. At one point, Mitterrand told a joke in French. None of the French speaking people at the table laughed. His translator then repeated it in English and everyone laughed hysterically. I asked Elie

whether the joke was funnier in English than in French, and he replied, "No, but Mitterrand doesn't know how to tell a joke, his translator does."

Recently, Elie had quintuple bypass surgery. I had lunch with him shortly thereafter, and all he could talk about was the future and how important it was to keep up the struggle for human rights. Elie Wiesel is truly one of the great men of the 21st Century. When I think of how close he came to not surviving, and when I think of how many other Elie Wiesels were lost in the flames of Auschwitz, I begin to understand the full horrors of the Holocaust.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 502009CA040800XXXXMBAG

JEFFREY EPSTEIN,

Plaintiff,

vs.

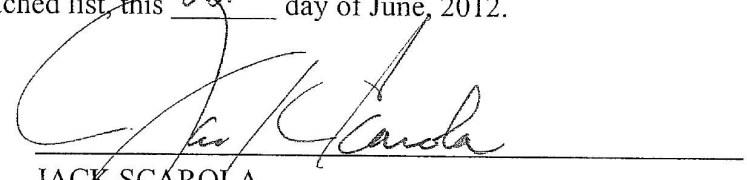
SCOTT ROTHSTEIN, individually,
BRADLEY J. EDWARDS, individually, and
L.M., individually,

Defendant,
_____/

NOTICE OF FILING TRANSCRIPT IN SUPPLEMENTAL SUPPORT OF BRADLEY EDWARDS' MOTION FOR SUMMARY JUDGMENT

Defendant/Counterplaintiff, BRADLEY J. EDWARDS, by and through his undersigned attorneys, hereby gives notice of the filing of the transcript of the deposition of Scott Rothstein taken on June 14, 2012. Specific portions of the deposition on which Mr. Edwards' relies in support of his motion for summary judgment are highlighted.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all counsel on the attached list, this 22ND day of June, 2012.



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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION

JEFFREY EPSTEIN,
Plaintiff,
vs. No. 502009CA040800XXXXMBAG
SCOTT ROTHSTEIN, individually,
and BRADLEY J. EDWARDS,
individually,
Defendants.
_____/

500 East Broward Boulevard,
Ft. Lauderdale, Florida
Thursday, June 14, 2012
9:14 a.m. - 12:37 p.m.

D E P O S I T I O N
Of
SCOTT ROTHSTEIN
(Via Video Conference)

Taken on behalf of the Trustee
pursuant to a notice of taking deposition

- - -

1 APPEARANCES:
2
LAW OFFICES OF TONJA HADDAD, P.A. by
3 Tonja Haddad, Esq.
Attorney for the Plaintiff.
4
5 ATTERBURY, GOLDBERGER & WEISS, P.A., by
Jack Goldberger, Esq.
6 Attorney for the Plaintiff.
7
SEARCY DENNEY SCAROLA ET AL, by
8 Jack Scarola, Esq.
Attorney for the Defendant, Brad Edwards.
9
10 MARC NURIK, P.A., by
Marc Nurik, Esq.
11 Attorney for Scott Rothstein.
(Appearing via Video Conference.)
12
13 U.S. ATTORNEY'S OFFICE, by
Laurence LaVecchio, Esq.
14 Attorney for the Department of Justice.
15
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2

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
SCOTT ROTHSTEIN				
(By Ms. Haddad)	5			
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(By Mr. Scarola)		121		

EXHIBITS

PLAINTIFF'S	FOR IDENTIFICATION
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1 Thereupon:
2 SCOTT ROTHSTEIN,
3 was called as a witness and, having been duly sworn,
4 was examined and testified as follows:
5 THE WITNESS: I do.
6 MS. HADDAD: Good morning, Scott. How are
7 you?
8 THE WITNESS: Good morning, Tonja. How are
9 you?
10 MS. HADDAD: Fine, thank you. It's nice to
11 see you.
12 THE WITNESS: Good to see you, too.
13 MR. SCAROLA: Mr. Rothstein, I don't know
14 that you and I have met. I'm Jack Scarola, I'm
15 representing Brad Edwards and I know you know Brad
16 who's to my immediate left.
17 THE WITNESS: Hey, Brad, how are you?
18 Jack, good to see you.
19 MR. SCAROLA: Thank you.
20 MR. GOLDBERGER: Also present is another
21 Jack, Jack Goldberger, and I also represent Jeffrey
22 Epstein. To my right is Darryn Indyke --
23 THE WITNESS: Good morning, Jack.
24 MR. GOLDBERGER: How are you today?
25 And to my right is Darryn Indyke, who is

1 Mr. Epstein's in-house counsel.
2 MR. INDYKE: Good morning.
3 THE WITNESS: Good morning, sir.
4 MR. NURIK: Good morning, everyone.
5 MR. GOLDBERGER: Hi, Marc, how are you?
6 MR. NURIK: Good. You'll be seeing my
7 shoulder most of the day.
8 MR. GOLDBERGER: Okay.
9 DIRECT EXAMINATION
10 BY MS. HADDAD:
11 Q. Well, Scott, I know you've talked about this
12 probably more than you even care to, but I'd like to
13 start a little bit asking you about the scheme at your
14 firm and how and when it started and things of that
15 nature just very briefly because I know you've covered
16 it many times.
17 MR. SCAROLA: It has been covered and
18 protocol precludes asking questions that have already
19 been answered and covering areas that have already
20 been covered, so we do object.
21 MR. GOLDBERGER: Your objection is noted.
22 BY MS. HADDAD:
23 Q. When did this first start?
24 A. It started back in '05, '06. The question
25 is a little bit vague for me because it started in a

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different form than it ended because it started as bridge loans and things of that nature, and then morphed into the Ponzi scheme. But you are looking back into the 2005 time frame for the very beginning.

Q. The 2005 time frame, that's when the bridge loans started?

A. I can't be certain exactly what we were doing. I need to see all the documents to tell you what we were doing at what specific point in time.

Q. What made you decide to start doing this?

A. I started doing it out of greed and the need to support the law firm, which was having significant financial trouble at the time.

Q. And in 2005 had you moved over to 401 yet or were you still in the building where Colonial Bank was?

A. I don't remember.

Q. Do you recall approximately how many attorneys you had working for you when it started?

A. I do not. Between five and ten, Tonja.

Q. Was it before you started acquiring attorneys like you were acquiring cars and watches?

MR. SCAROLA: Object to the form of the question, vague.

THE WITNESS: Yes.

BY MS. HADDAD:

Q. Well, who were you partners with when it first started?

A. Stu Rosenfeldt.

Q. Okay. Anyone else?

A. Susan Dolin, I believe. It was definitely Stu Rosenfeldt, Michael Pancier, and Susan Dolin may have been partners of ours at that time, I'm not certain.

Q. Because if memory serves me correctly, you went from being in the One Financial Plaza Building to the building across the street, it was Rothstein, Rosenfeldt, Dolin and Pancier; is that correct?

A. Yes.

Q. And it was some time later that you moved into the 401 Building, correct?

A. You are skipping one step. I went from One Financial Plaza to Phillips, Eisinger, Koss, Kusnick, Rothstein and Rosenfeldt. Then Stu Rosenfeldt and I broke off and formed Rothstein Rosenfeldt. And then Rothstein, Rosenfeldt, Dolin, Pancier over at the Colonial Bank Building. And then we took the space in the 401 Building and eventually moved over there and that's when the real growth started.

Q. And when you say, "that's when the real

growth started," do you mean both the scheme -- do you mean the scheme and the firm or either one or both?

A. Both.

Q. Do you recall approximately when you took the space in the 401 Building?

A. I do not.

Q. At the time everything imploded, how many partners did you have at the firm, do you recall?

A. Are you saying partners and shareholders? Because remember, we had both, two designations.

Q. I want to start with just attorneys that had -- not in your firm name but named as "partner" on the cards, for example.

A. I'd have to see a list of all the employees. We had a bunch.

Q. Do you recall about how many attorneys you had working there?

A. Approximately 70.

Q. In the year before, do you recall how many you had?

A. I do not.

Q. So how many equity partners did you have or shareholders? I'm not sure of the word that we are using.

A. Actual shareholders, equity shareholders

were two, me and Stu Rosenfeldt.

Q. And everyone else was just a partner for title purposes?

A. There were shareholders for title purposes and partners for title purposes.

Q. If someone was called a shareholder for title purposes then, did they get to receive any of the funds? Were they shareholders receiving money or they were not considered shareholders in that sense?

MR. SCAROLA: Objection to the form of the question.

THE WITNESS: What kind of funds are you talking about?

BY MS. HADDAD:

Q. In general from the firm. When you say equity shareholders, I understand that's you and Stu. What I'm saying is, if you had someone else that was named as a shareholder, why did you call them a shareholder as opposed to a partner?

A. It was a title of prestige and achievement.

Q. So it was basically an ego thing, it had nothing really to do with the finances or hierarchy of the firm?

A. They got paid more generally, but it did not have anything to do with distributions.

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Q. When you were hiring and bringing in all these new attorneys, did everyone come in as a partner?
A. No.
Q. How did you decide who came in as a partner and who came in as an associate?
A. Depended upon their level of expertise, practice, book of business. It was a decision Stuart and I made together on a case-by-case basis.
Q. So you and Stu where the -- were in charge of hiring?
A. Stuart and I tried to consult on every hiring decision, yes.
Q. Did you guys also decide salaries?
A. I generally decided the salary and then let Stu know what I was going to do. And he would say if he thought it was okay or if he thought it was too much or too little, but I generally had free reign in that regard.
Q. Did someone's book of business directly correlate to the salary that you would offer?
A. That is a very broad question because it depends upon what other needs we had for that individual.
Q. What do you mean by "what other needs"?

A. Well, I'll give you a good example. My lawyer, Mr. Nurik, his salary was directly related to the fact that he was a great lawyer and had a solid book of business.
Q. Yes.
A. David Boden, on the other hand, was, as I previously testified, I don't know if you've had a chance to read the testimony, but David Boden was not only the general counsel to the law firm but he was also -- acted as my consigliere in a significant number of illegal operations and he was compensated significantly for that, if that helps you understand the difference.
Q. It does.
So, for example, when you were hiring former judges, let's use that as an example, Pedro and Julio, clearly they don't have a book of business coming in because they haven't had clients, but they may carry some sort of prestige or give some legitimacy, if you will, to the firm. How would you decide the salary for someone like that?
A. Stu and I would discuss it. It was more a market issue than anything else, how much are judges coming off the bench getting, how much business do we think they can generate.

Q. Would you need to look at someone's book of business if they were coming in just solely to be a rainmaker for the firm prior to hiring them?
A. I discussed it with them. There were not many people that I recall that I actually looked at their numbers. Once David Boden was working for me I had him check people's numbers, but I rarely looked. I took most people's words for what they were generating.
Q. My recollection is, you were always looking to bring in more people, to hire more people, some of us were somehow able to resist you while others were not. How would you decide who you were looking at to bring into your firm?
A. We were trying to develop, on the legitimate side of the law firm, we were trying to develop real talent, real practice groups. I mean, Brad is a perfect example, great lawyer, got a great reputation. You know, it was our hope that, you know, he was going to be one of the people to actually in some ways rescue the firm because he had a practice group that could generate substantial income. You know, on the legitimate side that's what we were trying to do, we were trying to find the best and the brightest.
Q. Okay. With respect to bringing people that

you thought could bring a book of business, you just said Brad, for example, that he had a legitimate practice group with a good book of business. How did you know that?
A. Everyone in the tort world that I had spoke to spoke extremely highly of Brad, not only people I already had working for me but other people that knew him. He was very -- came very highly recommended to us.
Q. Like who, for example?
A. We wanted him in there. We were trying to develop a significant tort group and we thought that he'd be a great part of it.
Q. Who besides Russ told you that about Brad?
A. It would have been other people in the tort group. I don't want to guess, Tonja, as to which other people told me, but it was -- well more than Russ.
Q. Was it people within --
A. Might have been people in politics that I talked to that knew him because we had significant input at the gubernatorial level with regard to tort reform and the like, and there were people there who knew who Brad was. It was more than one person that told us that.

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Q. Okay. When you were looking at people to bring in to the firm to legitimize, as you said. Your firm had a very unique area of practice and had a very unique environment to which to work. How did you know or how did you come to decide what people may or may not fit into that?

A. Okay. Hang on one second. I think you just accidentally misstated my testimony.

I was not bringing the people in to legitimize the law firm. I was bringing them in to the legitimate side of the law firm. The bulk of the law firm, despite the lack of financial success, was a large group of very honest, hard working lawyers trying to do their best in difficult economic conditions. There were some that were obviously not legitimate. And the way I decided to bring people in, again, it's really everything I just told you. Are you looking for how I brought people into the Ponzi scheme?

Q. No, right now I'm just asking about the firm because, as I said, it's a very unique way in which to practice and a very unique workplace environment with politics and restaurants and parties at your home and things of that nature. I'm asking, personality wise, other than the book of business, how did you decide on

people that would be a good fit?

A. I looked for people that were outgoing, that had the type of personality. On the legitimate side of the business, people that had charisma that were -- that could go out and hustle and try to develop a book of business if they didn't have it. And as one of the 50 percent of the shareholders of the firm I was trying to hire people I wanted to work with.

Q. Okay. When you would see people from whom you would offer jobs, for example, as you mentioned earlier with Brad and his practice, if somebody stated that people told you that he was a good lawyer, did you need to see him in action, so to speak, prior to your deciding to hire them or would you just take people at their word for it?

A. Some of people I saw in action; he wasn't one of them. Steve Osber is an excellent example of that. I hired Steve after he was beating the living daylights out of me on the other side of a case. And I certainly would ask around about the people. But the people that I trusted -- see, I can't remember. I think Gary Farmer was working for me before Brad, and if I'm not mistaken he would have been one of the people that I went to with regard to Brad because we were really developing that whole tort group around

that time with Farmer and Fistos and Jaffe and Mr. Edwards.

Q. Do you know where Mr. Edwards was working when you first learned of him?

A. I don't recall whether he was working for someone or had his own practice, I don't recall.

Q. When did you first learn about Brad?

A. I don't remember the time frame.

Q. Do you recall when you first met with him regarding a job?

A. No. The easiest way to figure that out is to go look at his personnel file, it will have the notes saying when he met with me the first time.

Q. You don't have any recollection of your first meeting with him?

A. No. As you know, I was hiring people left and right and I was also unfortunately very busy doing things I shouldn't have been doing, so I don't have a specific recollection of when I hired him. I barely have a specific recollection of when I hired me.

Q. But you did, in fact, meet with him?

A. I'm certain I met with him before I hired him. I can't imagine -- although I did hire people without meeting them. I did hire people based on other people's word, if they were people within the

firm that I trusted. Because I always said, I had a very simple, you lie or die by what you are telling me. If you are telling me this guy is good and he's not good, that's on you, it's going to hurt your income. So I used to tell my partner, people that were recommending people to me, don't sell me a bill of goods just to get somebody in here because if you do that it's going to come back on you, it's going to affect your income and your ability to grow in the firm. So with that admonishment, I might have very well hired someone sight unseen based upon what someone else told me.

Q. But you did meet with Brad you say before he came in to work?

A. Now that I'm saying it out loud, I think I did but really I'm guessing. I don't have a specific recollection of meeting him.

Q. Do you recall if you knew that he had worked as an assistant state attorney for a few years prior to doing tort litigation?

A. I don't recall that one way or the other.

Q. So you wouldn't have asked Howard Scheinberg or anybody about him before he came to work there?

A. I can't say that I wouldn't have asked because, like I said, I might have asked. But

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unfortunately, you are taking a little tiny spot out of a very, very busy time period in my life and in the life of the firm, so I can't tell you one way or the other.

Q. I know you had a lot going on, I'm just trying to see if you remember anything specific about this.

Do you recall what salary you had offered Brad to come join the firm?

A. I do not. You have to just try to differentiate that what I knew then is a lot different than what I know now so ...

Q. Meaning?

A. Obviously meaning that at the point in time that I was hiring him or maybe a year after, I would be able to tell you what I was paying him, but now it's insignificant. I don't remember how much I was paying him.

Q. Did you learn about his book of business or know what kind of cases he was bringing in prior to hiring him?

A. I do know that he -- I discussed either with Russ, well, I know with Russ, and perhaps some other people, I knew about the Epstein case.

Q. What did you know about it?

A. I knew that it was a significant case of potentially significant value against an extremely collectible pedophile, for lack of a better word.

Q. So was that case your primary motive in bringing Brad into the firm?

A. I doubt it. I mean, I can't tell you one way or the other, but I doubt that I would bring him in just for one case because what if the case fails, then I'm stuck with a lawyer who can't do anything, you know.

I'm not saying, Brad, that you couldn't do anything, I'm just saying that if I only relied on one case, then if I bring a lawyer in for one case and one case only, what do I do with him when the case is over.

Q. How did you know that this case would be a collectible case then?

MR. SCAROLA: I'm going to object to the form of the question because it misstated the prior testimony. The prior testimony was not that it was a collectible case but that it was a case against a "extremely collectible pedophile."

BY MS. HADDAD:

Q. What made you think that this case had any financial value?

A. Epstein was a billionaire.

Q. Okay. Did you know anything about the legitimacy or illegitimacy of the claims prior to knowing he was a billionaire?

A. I knew what I was told. I didn't check it out myself, but I trusted the people that told me.

Q. And who told you?

A. The only person I remember discussing it with, as I sit here today, is Russ Adler. But if Farmer and Jaffe and those guys were with me at the time, I likely would have discussed it with them as well.

Q. So were you aware of this case before you made an offer to Brad to join the firm?

A. Yes.

Q. You said you didn't -- I don't want to misquote you. You said you heard about it from other people, but you didn't do anything to know that personally. Was that before you made the offer of employment?

A. I made the offer of employment based upon what other people had told me about Brad.

Q. About Brad and his book of business or just Brad and his legal skills?

A. Okay. When I say Brad, I mean Brad and his

book of business and his legal skills.

Q. Okay.

A. And his ability to generate business in the future.

Q. You stated that you believed that you first heard about these cases from Russ and then perhaps from Brad. Once Brad was at the firm, did you keep up with these cases, these Epstein cases?

MR. SCAROLA: Excuse me, I'm going to object to the form of the question. It is an inaccurate reflection of the prior testimony. It has no predicate. There was no reference about having heard about these cases from Brad. The names mentioned were Adler, possibly Farmer, possibly Jaffe.

BY MS. HADDAD:

Q. Once Brad started working at the firm, you've already testified you already knew about these Epstein cases, correct?

A. Yes.

Q. How did you keep abreast of these cases?

A. I didn't.

Q. You didn't know anything about them?

A. I didn't say I didn't know anything. I said I didn't keep track of it.

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Q. You didn't keep track of it?
A. I did not keep track of it. From time to time Russ and the other guys in the tort group would tell me what was going on in certain cases, but until I made a decision to utilize that file for an illegal purpose related to something illegal that I was doing along with my co-conspirators, I just assumed my lawyers were going to work the case and eventually it would hopefully work out well for the law firm.
Q. At your firm, when e-mails would go out to attorneys at RRA or all attorneys at RRA, were you part of that e-mail group?
A. You are talking about all staff?
Q. No, all it says is attorneys at RRA.
A. It's the e-mail group "attorneys"?
Q. Yes.
A. Yes, I'm a part of that e-mail group.
Q. And I appreciate that you were very busy and may not have read all of them, but you did receive those e-mails when they would go around?
A. Yes, and I tried my best to read them.
Q. Okay. At what point did you decide to use this case to further your Ponzi scheme?
A. I don't remember the date, but I can give you the circumstances, if you'd like.

Q. Please do.
A. The Ponzi scheme was running very low on capital. My co-conspirators and I needed to find a new feeder fund, new investment sources. We had a couple of very large, significantly wealthy potential investors out there. I was looking for something that would have been very attractive. We had had a lot of inquiry during the due diligence period with these people that were doing due diligence on the putative cases that we were selling. And when I thought about the Epstein case, realizing that it was a substantial actual file in the office, I came up with the idea that if I created a fake confidential settlement circling around -- based upon this actual case, they would be able to increase the level of due diligence that I was able to offer to my potential investors.
Q. How did you know this was a substantial file in your office at that time?
A. Again, through the people I spoke to in the office.
Q. Such as who?
A. Again, same people, Adler, Farmer, Jaffe, Fistos.
Q. You never spoke to Brad about this case?
A. I didn't say that, but I had a lot more

interaction --
Sorry, Tonja, I didn't mean to speak over you.
If you talk to the people in the firm, if they are honest with you, they'll tell you my interaction was far more significant with Russ Adler, probably more so because he was a co-conspirator of mine. My interaction with Russ was far greater by many, many percents over my interaction with Brad, and then you go down the line. I had more interaction with Mr. Farmer than I did with Mr. Fistos, more interaction with Jaffe than I did with Mr. Edwards, and so on.
Q. Russ was the head of your tort group, right?
A. Yes.
Q. So these cases fell under the tort group; is that correct?
A. Yes, it fell under the -- fell under Russ' purview ultimately, yes.
Q. And Brad was a partner at your firm during the time these cases were there, correct?
A. I believe that was his title. He was either partner or shareholder. I don't think we had made him a shareholder yet.
Q. But he wasn't coming in as an associate,

correct?
A. To the best of my recollection, no.
Q. So you stated that you learned this case was -- I don't want to misquote you and listen to a long speaking objection, but what did you call this case?
MR. SCAROLA: Who wants the quote?
THE WITNESS: It was a substantial case with a -- what I perceived to be a highly collectible pedophile as a defendant.
BY MS. HADDAD:
Q. Right. How did you know at the time when you said these investors wanted to investigate and you said you were going to create a fake settlement, how did you know that this case was the case that you could use?
A. From talking to all the people that I just said, Adler, Fistos, Jaffe, Farmer, Mr. Edwards, to the extent that I spoke to him about it.
Q. Did you speak with Mr. Edwards about the case?
A. I don't have a specific recollection one way or the other. I remember speaking to him at least briefly the day or the day of or the day before the actual investor's due diligence was going on as to

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what was going on. And I may have spoke to him, I know I spoke to Russ, but I may have spoke to him as well within a couple of days just prior to this due diligence because I was trying to at least get some information in my head that I could use when I was creating this story for the investors.

Q. Scott, what's Q-task?

A. Q-task is a web based software system that I had invested $7 million in.

Q. And what was the purpose of this internet system?

A. To be able to communicate in a secure fashion and in a unique group fashion about specific files.

Q. So forgive me, we all know I'm not good with the computer. That was something that would be useful within a law firm, why?

A. Because it allowed you to create groups and have both general and private chats, organize data in a very unique fashion. That was, at least to our way of thinking, would have been very, very helpful in the law firm setting with multiple practice groups.

Q. Did you belong to any groups on Q-task?

A. I'm certain that I did. I don't remember which groups I belonged to. I never got into the full

use of it. I tried to, but again, I was very busy doing other things. But I know that Mr. Adler's group used it extensively.

Q. Because it was your firm and, as you said, you invested $7 million in it, did you have the ability to access a group if you wanted to?

A. Yes. And if I couldn't, I could get Russ to give me access.

Q. So you didn't necessarily have to be invited into the Q-task group for you to be able to utilize or view the communications within it?

A. No, that's not true. I actually had to be invited, that's what I was telling Russ to do, is to have me invited.

Q. But I'm saying, the lawyers wouldn't have to personally invite you, you can get someone within your firm to give you access maybe without the lawyers knowing?

A. No, I think it might have had a, quote, unquote, confidential, super secret viewing capability, but I don't recall it having that, and I'd have no need to utilize that. Just invite me into the group and let me see what's going on.

Q. Okay. I know that you are or were a very hands-on person within certain of the practice groups

and with that, with the Q-task and the e-mails, did someone assist you with reviewing everything and letting you know what was going on within the groups?

MR. SCAROLA: Excuse me, I'm going to object to counsel's testimony. Object to the form of the question as leading.

THE WITNESS: I really don't even understand the question.

Can you try to rephrase it for me, Tonja?

BY MS. HADDAD:

Q. Of course, I would.

Did you keep abreast of everything that was going on in every practice group or was someone through Q-task and e-mails, for example, or was someone giving you information keeping you posted on what was going on within the practice?

A. Well, as part of the tort group I had a pretty good idea of what was going on there all the time just because of the significant amount of interaction, both legitimate and otherwise, that I had with Russ Adler, so I was probably more up-to-date on that group than any group other than the labor and employment group, again, because I had such significant interaction with Stu Rosenfeldt, both legitimately and illegitimately, so I knew what was

going on in that group.

I tried, as best as I could, given my time constraints, to stay on top of what was going on, you know, throughout the firm. But I relied on other people like Debra Villegas and Irene Stay and David Boden, Les Stracker to the lesser extent, to monitor what was going on in the different practice groups and keep me up to speed.

Q. Was there audio and video surveillance throughout the entire firm or only within your office?

A. No, through the entire office, not in the individual offices.

Hang on. Not in the individual offices but throughout the general office space.

Q. So in 2009 how many floors did you have?

A. Three, I think.

Q. And do you recall approximately how many attorneys you had working there at that time?

A. Approximately 70.

Q. And when you say "not the individual offices but the other areas," do you mean -- would that include conference rooms?

A. I didn't have surveillance in the conference rooms.

Q. So can you please tell me exactly where you

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1 had audio and/or video surveillance? We'll start with
2 audio.
3 A. I don't have a specific recollection of
4 every place I had video and audio, but it was in -- I
5 had it set up so that in all of the common areas,
6 including our shareholder's lounge, we had -- I had
7 audio and video capabilities.
8 Q. When you say "capabilities," does that mean
9 you didn't always turn it on or you just turned it on
10 when you felt like it?
11 A. I turned it on when I felt like it, when I
12 felt like seeing what was going on. I sometimes left
13 the screen up because I had four computer screens on
14 my desk, I sometimes left the screen on with the video
15 of the reception area and some other general areas.
16 But unless I wanted to see what was going on or listen
17 to what was going on, I didn't turn it on. It would
18 have been too distracting.
19 Q. Did the attorneys know that this
20 surveillance existed?
21 A. You can see it in the -- it wasn't hidden,
22 you can see it. There were globes up in the ceiling
23 all over the office.
24 Q. Did you have -- you said -- you didn't
25 answer this, you said you didn't recall. Did you have

1 any surveillance in the conference rooms?
2 A. No.
3 Q. Other than the common areas you just went
4 over, in the hallways and the reception -- did you
5 have it in the hallways, is that a common -- do you
6 deem that a common area?
7 A. All the hallways pretty much with the
8 exception of a few blind spots, I can see all the
9 hallways.
10 Q. And this was on all three floors?
11 A. Yeah. For some reason I think we might
12 have taken some space on a fourth floor, but I could
13 be mistaken. But yes, on the three floors that we
14 actively had a significant amount of space on, I tried
15 to have surveillance on all the common areas of all
16 that space.
17 Q. And what floor was Mr. Edwards' office on?
18 A. I don't recall.
19 Q. Did you have the tort group all together or
20 was it divided up?
21 A. Except for Adler, Adler was on with -- near
22 me, down the hall from me. The rest of the group was
23 all together. I think they were on -- let's see.
24 There were people up on 22. I was on 16. He must
25 have been on the other floor that we were building

1 out, because I remember building out space and I
2 remember Jaffe and all those guys moving into that
3 space.
4 Q. If you were building up that space, do you
5 recall when you put the surveillance in there?
6 A. It would have been while they were building
7 it out or shortly thereafter.
8 Q. During 2009 it seems that you hired lots of
9 former law enforcement people to work at the firm.
10 Why were they people you wanted to hire?
11 A. Severalfold. I had a significant amount of
12 illegal activity going on with various law enforcement
13 agencies throughout South Florida and hiring people
14 from former law enforcement assisted me in engendering
15 support and camaraderie with the law enforcement that
16 I was actually utilizing in illegal activities.
17 Q. So you are saying --
18 A. Secondarily, I wanted to have a very strong
19 investigative team, ultimately, to do both legitimate
20 and illegitimate things for the law firm, and hiring
21 former law enforcement was the best way to do that. I
22 was hoping to actually ultimately create a group. Ken
23 Jenne and I had talked about that extensively.
24 Q. Why did you hire Ken Jenne?
25 A. Prior to Ken going to prison, he and I were

1 very friendly and he was extremely friendly with
2 someone that was very close to me, Grant Smith.
3 During the time that he was down in FDC Miami, I went
4 down to visit him. And after speaking to him and
5 after speaking to Grant, I told him, because he was
6 talking to me about how many people had turned on him
7 and abandoned him. And I told him that when he got
8 out of jail that he had no worries, that I would give
9 him a job.
10 Q. And what --
11 A. And that was the primary reason -- that was
12 my primary reason for hiring him.
13 Q. What was it you were hiring him to do
14 exactly?
15 A. Ultimate the goal was to head up on
16 investigative arm within RRA, within the RRA entities.
17 Q. Well, while he was there, since that didn't
18 happen, what was his obligation to the firm
19 day-to-day?
20 A. He handled firm security issues and he did
21 handle overseeing certain investigative things. We
22 had an alcohol and beverage group that was forming and
23 he was overseeing that. He was helping me find new
24 people to staff it, that kind of thing.
25 Q. Did you have a lot of interaction --

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A. He had had significant -- as you know, he also had significant political connections and everyone who is not living under a rock knows I was doing everything I could to garner significant political power.

Q. I think many people miss your parties.

But, with respect to Mr. Jenne and his political connections, were you hiring him to utilize him with respect to any of the police department investigations? You had stated earlier you had dealings with police departments. I don't want -- again, I don't want to put words in your mouth. You said you had dealings going on with various police agencies?

A. I had -- I mean, we had a criminal defense section in the law firm, so we had legitimate dealings with law enforcement. But I also had significant illegitimate things with law enforcement that had nothing to do with Ken Jenne.

Q. And how about with respect to former FBI agents you were hiring?

A. They were all people that were operating in a legitimate fashion within the law firm.

Q. In what role was that?

A. The investigative roles and the alcohol

beverage roles and anything else Ken or other staff could think of to have them do.

Q. Let's talk about the investigative roles for a minute.

What kind of investigations were these teams running?

A. I do not know. You have to speak to lawyers that were actually utilizing them. I put it out there and Ken put it out there, that they were available to lawyers in the firm for use like in-house investigators. And what people did with them ultimately was up to them.

Q. Were they on salary or were their costs and fees associated with utilizing them within a specific practice group?

A. They were all on salary with me. The ultimate goal was to have it as a separate entity that could bill the law firm and have the clients at least defray some of the cost. I don't recall whether or not we ever got to that level or not.

Q. With all that in-house police action, why did you have police security surrounding you all the time?

A. I guess the best answer was I was paranoid, but I mean -- that's the simple answer to it. You

know, having -- there were mixed reasons. For example, I -- are you talking about my Fort Lauderdale police detail?

Q. Yes. You had it at the office and at your home, correct?

A. Yeah. There's a myriad of facts that motivated me to do that. One was that I really wanted the security for the office. Two was, I was paranoid and this is in no particular order. Three was the Melissa Lewis murder that shook the entire law firm and shook me terribly. I didn't want that to ever have to happen again. And four was, I wanted -- the more law enforcement you have around, the more legitimacy it adds to you and your appearance to the community. So there were a multitude of reasons.

I mean, I hired certain law enforcement to work for me that were just friends of mine that were -- that needed additional money, so I wanted to make sure that they had money, both guys that did the illegal stuff for me and guys that didn't do anything illegal for me.

Q. Let's go back to the Epstein case and when you decided to utilize it -- to use for the investors for your Ponzi scheme.

Do you recall approximately when it was that

these investors were coming that you decided to use the files?

A. My best recollection it was in 2009, sometimes after April of 2009, but I don't have a specific recollection beyond that.

Q. What makes you think it was after April of 2009?

A. Because, to the best of my recollection, the Clockwork Group came in towards the middle of 2009. When I say Clockwork, that's an umbrella term that I use to mean the Von Allmen, AJ Discala, and other investors that came in through that feeder fund.

Q. So that was around April 2009?

A. No, it was after, to the best of my recollection. I mean, you can tell because all you have to do is look and see when the first, very first Clockwork investment is. Actually, you can pinpoint it even closer. Look for the very first settlement deal that we did that was related to the Epstein case, within 60 days prior to that would have been when I was meeting with those due diligence people, 30 to 60 days before that.

Q. So when you decided to use that case, take me through exactly what you did to familiarize yourself with that case.

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A. I talked to Russ Adler. I may have talked to some of the other lawyers. I flipped through certain boxes in the file.
Q. How did you get the boxes?
A. I asked someone to bring them to me.
Q. Do you know where those files were stored?
A. I do not.
Q. So you flipped -- sorry, please continue. Flipped through some files?
A. I flipped through some files. I had the files in my office. The day that the investor group came in, I actually had Ken Jenne and some others actually bring me some more of the boxes actually into my office while the investors were there. I already had some of the boxes with me.
Q. You say "Ken Jenne and others," who were the others to whom you are referencing?
A. I don't specifically recall who carried them in. I was very focused on my investors at that time.
Q. Were any of the lawyers present with you when you were meeting with these investors?
A. During the actual meeting with them, no. I recall that some of the lawyers may have met some of the investors, but I don't recall who.
Q. Do you recall approximately when that

happened?
A. No, it's the same dates that I was giving you before.
Q. Okay. So you had, to further your Ponzi scheme, you had to familiarize yourself with this case so that you could speak intelligently with the investors; is that correct?
A. Well, sort of because most of what I told the investors was all things that I was creating as I went.
Q. About this particular case, the Epstein case?
A. Yes, from an investor -- you have to understand how the inner working of the Ponzi scheme were crafted but --
Q. Please tell me then.
A. I'm telling you -- hang on. From an investor's standpoint, the investor is simply looking for is the case believable. And once they get past that, is it of such case -- excuse me, is it of such a nature that it is possible to be generating a significant amount of settlement dollars. And then after that, their concern is simply on the due diligence side of making sure we actually have the money, that the documents pass -- the documents

unrelated to this case, documents related to the settlements. Other than proving the existence of the case, there's very little an investor, at least from my end, investigates into the actual case. It was more after having the case exist and not caring about really what was going on in the case other than a lot of money was going to be collected.
Q. Well, with respect to showing them that the case existed and that there was a likelihood of a possibility of a payday at the end, how did you convince them of that? What did you use to convince them of that?
A. I did two main things. One, I put the boxes in my office while they were there. I told them to specifically look at a couple of sheets of a flight manifest that was in the file that Russ had shown me. And I told them that it would be a breach of attorney/client privilege for them to look at the file, but that I was going to step out for a while and leave them there with the boxes, wink, wink, and that's what I did. I stepped out, I let them look at whatever they wanted to look at. I came back in, they were satisfied that it was a real case and I was off and running.
Q. And these were the real legitimate files for

this case; is that correct?
A. These were the legitimate files, yes.
Q. Nothing had been created at this time for them to look through?
A. I didn't add anything to the case files. The case files were significant enough by themselves.
Q. Do you know how long they were in your office; days, weeks?
A. The people or the boxes?
Q. The boxes.
A. The boxes were in there probably a little more than a week. I don't have a specific recollection.
Q. Okay. Did you ever go through them?
A. Yes, I flipped through them at some point in time.
Q. And what do you recall about what you saw in the cases? Do you remember anything?
A. I remember seeing the flight manifest. I don't recall seeing anything else. I'm sure I looked at other things, but again, for my purposes it was insignificant to me because the actual content of the boxes was not necessary in the sale of the fake settlements.
Q. Why was the flight manifest so interesting

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to you?
A. Because of who was on it.
Q. Who was on it?
A. I don't recall, but I do recall saying to the investors -- I recall having a conversation prior to the investors coming in with Russ Adler and Russ had told me that Epstein had flown Bill Clinton on his plane, had flown Prince Andrew on his plane. And I don't remember whether that was on any of the flight manifests or not, but I left that to the investors' imagination as to what they were being told about Mr. Epstein and these other famous people that were cavorting with Mr. Epstein and let them look at the file.
You have to understand from an investor's perspective -- hang on. From an investor's perspective the only thing that matters to the investor is that it's a real case and that they can verify that real dollars are being paid. The fact that it was a real case was evident, I had a lot of boxes with real pleadings in it and a lot of other information in it. The fact that there was real money being paid was a fiction that was created by me and my co-conspirators, everyone from bankers, to computer people. So the actual role of the case, and I want to

make sure you understand this, the actual role of the actual physical case in the Ponzi scheme is, from my perspective, minimal. It was just another vehicle for me.
Q. After that initial meeting with the investors where they looked at the file, what happened with respect to their desire or lack of desire to invest?
MR. SCAROLA: Excuse me. I'm going to object to the form of the question, it assumes facts not in evidence. There's been no testimony that the investors actually looked at the files, only that they were given the opportunity to look at the files.
BY MS. HADDAD:
Q. Was your video surveillance on when you left the investors alone in your office?
A. No, no, I didn't have cameras in my office. I didn't let people look in my office when I was in there, that would have been bad.
Q. So you left them alone in there?
A. Yes.
Q. Do you recall for approximately how long?
A. No more than 20, 30 minutes. It was a short period of time.
Q. When you went back in what happened?

A. I went back to selling the Ponzi deal.
Q. And did you sell it?
A. I believe I did. You'd have to look at the actual settlement documents to see if I put one together for that, but I'm pretty sure we did.
Q. Do you recall if the investors asked you for any additional information or any additional documentation?
A. I don't recall one way or the other.
Q. After this initial meeting with the investors, did you give any direction regarding this particular case?
A. To whom?
Q. To any of the attorneys working on the Epstein case.
A. No. I didn't interfere in how they were running their cases. They were far more experienced than I was in that type -- in handling that type of case. As a matter of fact, I was practicing very little real law at this point in time. I wouldn't have had time to tell them or to get involved.
Q. Did you ever keep up with this case after this initial meeting with the investors?
A. I'm certain that I talked to Russ Adler about it from time to time, but my main focus by this

point in time in 2009 was the Ponzi scheme.
Q. Did you try to sell this particular settlement to any other investors?
A. I don't recall one way or the other.
Q. Okay. Did you ever have any conversations with any of your investors about this Epstein case?
A. I don't recall one way or the other.
Q. I notice there's been a privilege log produced with respect to e-mails. There seems to be quite a bit of communication between you and Ken Jenne with the topic being the Epstein case. Do you have any recollection what that would be about?
A. I don't. As I sit here today, I don't have a specific recollection of having significant e-mail contact with Ken Jenne about the case. But if you are telling me I did, I'll accept that, but I don't recall what it was.
Q. Earlier you had stated that when you were hiring good attorneys such as Mr. Edwards, looking at their book of business was -- I don't want to put words in your mouth -- it was the legitimacy of the practice, it would bring in legitimate money to the practice, is that what you were hoping to do?
A. Earlier when I testified I specifically testified that I personally did not look at most of

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their book of business. This being said, I was bringing in legitimate lawyers to form legitimate practice groups to practice legitimate law, having nothing to do with the Ponzi scheme.

Q. During the year 2009, were there any, to your knowledge, any big settlements of any cases at RRA?

A. To the best of my recollection, no. We had a dismal year.

Q. The year 2009 was just dismal across the board?

A. Some people did better than others, but yes, overall it was for a firm of 70 lawyers, it was dismal.

Q. So there were no big wins coming into the firm as far as a financial windfall other than from your other businesses?

A. The only significant capital coming into the firm was money my co-conspirators and I were stealing.

Q. Was there any particular practice group that you can remember that had a particularly non-dismal year in 2009?

A. Mr. Nurik had a good year.

Q. Do you recall what the gross revenue was from legitimate sources in 2009?

A. It was somewhere between eight and $10 million, probably right around the nine million mark.

Q. Do you know what your --

A. On its best day.

Q. What was your overhead for salaries in 2009, do you recall?

A. I don't have a clue.

Q. Was it more than you brought in legitimately?

A. With what I was paying in salaries, I'm -- I mean, I'd be guessing. If it wasn't more than, it was certainly close to it.

Q. That's just salary, that's not talking about anything else, rent, overhead, things of that nature?

A. That's correct.

Q. Who was paying for the investigations of the cases that were going on in 2009, the deposition costs, the filing of complaints, and things of that nature? Where did that money come from from your firm?

A. It varied from case to case.

Q. For the tort group?

A. It was fronted by the law firm for the most part.

Q. For the most part.

What wasn't fronted by the law firm?

A. I recall there being a couple of agreements that various tort lawyers had with certain clients where they were going to assist in helping to pay the costs. All the other costs would have been paid by the law firm, both through legitimate and illegitimate means.

Q. So when you say by "illegitimate means," where would the illegitimate means money come from?

A. It came from the Ponzi scheme, and all the tentacles of the Ponzi scheme, other illegal activity.

Q. Such as?

A. Things I was doing with law enforcement, things I was doing in politics, things that I was doing with organized crime, things I was doing with politicians, judges, other lawyers, bankers, business people, things of that nature, I'm sure there's more.

Q. Do you recall if any of these Epstein cases underwent significant investigation while the cases were at your firm?

A. I'd be guessing. I don't remember.

Q. There was a meeting in 2009, July of 2009, and it appears from the e-mail communications that it was for everyone in the firm to attend and it was

regarding the Epstein case. In fact, there was an Epstein conference room that was reserved for it. Were you present at that meeting?

A. I may have been.

Q. Do you recall?

A. I don't recall one way or the other.

Q. You don't recall it.

Do you recall anything about the Epstein case in July of 2009?

A. I do not. Do you have something that might refresh my recollection?

MS. HADDAD: Can we just take a five-minute break right now?

THE WITNESS: Sure.

MR. GOLDBERGER: Thank you.

MS. HADDAD: Thanks.

[Short recess taken.]

BY MS. HADDAD:

Q. Scott, I was asking you before we took the break about a meeting with respect to the Epstein cases. There was a 159-page privilege log filed, which I'm sure you don't have and are not aware of. But in it there are many, many e-mails to both attorneys at RRA, yourself, and Mr. Nurik regarding the Epstein litigation. And all this resolved in July

of 2009 about the Epstein meeting and some additional investigation into the Epstein case.

Does that refresh your investigation as to when you met with the investors in the Discala/Clockwork Group?

A. It does not. The best thing to refresh my recollection as to when I met with them would be to see the deal documents.

Q. Okay. I unfortunately don't have those.

Do you recall if you took Discala and his other investors to a football game in 2009?

A. Sure, I did.

Q. Okay. Would that be around the time you were trying to get them to invest in the case?

A. It would have been around the time I was trying to get them to invest in general. It's may have been around the time that I was showing them the Epstein file.

Q. Did you show them any files other than the Epstein file?

A. I may have. I don't have a specific recollection one way or the other.

Q. You testified earlier that you had over a dozen boxes brought to your office that were related to the Epstein case.

MR. SCAROLA: Excuse me, counsel. Counsel, there has been no such testimony.

BY MS. HADDAD:

Q. You said there were several boxes brought to your office by different people. You don't recall who that is; is that correct?

A. Yes, I had some boxes already in my office and I had Ken Jenne and some other people bring some others. I don't remember how many boxes.

Q. Was it more than three?

A. Sure, it was more than three boxes, yes.

Q. Was it more than 10?

A. I don't believe so, no.

Q. You stated that you looked -- I don't want to put words in your mouth. What did you look at specifically in that case?

A. Other than looking at the flight manifest that Russ Adler told me to look at, I have no specific recollection as to what I looked at in that file.

Q. Do you know if there was more than one case being prosecuted by your office against Mr. Epstein?

A. To the best of my recollection there were -- it was multiple plaintiffs.

Q. Okay. Do you recall if those cases were pending in state or federal court?

A. I don't recall.

Q. Did you check?

A. I don't remember one way or the other. It was insignificant to me.

Q. Well, then explain to me. You testified earlier that what was important to the investors to see is that there was a real case, correct?

A. Yes.

Q. What did you look at or show them -- what did you look at, first of all, to see if it was, in fact, a real case?

A. I knew it was a real case.

Q. How did you know?

A. Because my lawyers told me it was a real case. I believed them.

Q. What lawyers told you that?

A. I already told you it was a mixture of Russ and Jaffe and Fistos and Farmer and Mr. Edwards. I mean, I knew it was a real case. We had all these boxes, we had people really working on the file --

Q. How do you know --

A. -- or they were pulling a hell of a scam on me. Not that I didn't deserve it but ...

Q. How did you know, you just said you knew people were working really hard on this case. Who do

you know was working on the case?

A. The only people that I knew for certain were working on the case was Brad Edwards and Russ Adler was doing his supervisory schtick, whatever that was. But other than that, I don't know which other lawyers were assisting Mr. Edwards. I didn't get involved at that level.

As far as the Ponzi scheme goes, the only thing I cared about, Tonja, was being able to show the investors that this case that I was utilizing to steal a significant amount of money from them was a real case. That's all I cared about.

Q. That case came into your office through Mr. Edwards, correct? He brought it with him when he came to RRA?

A. Yes.

Q. He was lead counsel on the case, correct?

A. I assume he was lead counsel. I never checked to see if he listed himself as lead counsel.

Q. Do you know if any additional complaints were filed while the case was at RRA?

A. I have no idea one way or the other.

Q. Did you ever instruct, in furtherance of your Ponzi scheme, Mr. Edwards or anyone in that litigation group to file additional complaints?

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A. No.
Q. Who is Cara Holmes?
A. Who is who?
Q. Cara or Cara, C-a-r-a, Holmes?
A. To the best of my recollection, she was a former FBI agent or maybe IRS agent. I don't know. She was a former federal agent.
Q. Did you hire her to work for you?
A. It was either IRS or FBI.
Q. Did you hire her to work for you?
A. Yes, I hired her at the suggestion of Ken Jenne.
Q. For what purpose?
A. To work in the group that he was overseeing.
Q. So what did she do for RRA while she was there?
A. I don't remember.
Q. Did you ever mention her to your potential investors from the Clockwork group?
A. It's a possibility because, as I was building the Ponzi scheme, I frequently referred to the fact that we had former state and federal law enforcement working for us and on our investigative teams. It added legitimacy to the Ponzi scheme.
Q. Didn't you tell investors that she could

hack into a computer as part of her skills?
A. I certainly may have. I told the investors a whole host of lies about what was going on about with case and what people could do and did do.
Q. Did you ever personally utilize Cara Holmes' skills in any of your cases?
A. I don't remember.
Q. Were you handling any cases during the 2009?
A. I was overseeing cases in 2009, but my involvement was mostly supervisory. I was handling very little that was legitimate at that point in time.
Q. Were you legitimately, when I say "legitimately," were you invited into Q-task on any particular cases that you can recall?
A. I'm certain I was. I don't recall one way or the other.
Q. Do you recall if you were involved in Mr. Epstein's case on Q-task?
A. I may very well have been, but I don't have a specific recollection one way or the other.
Q. Do you know who invited you in?
A. I have no idea if I was invited in. And if I was invited in, I have no idea who invited me.
Q. Once you decided to use this case in your Ponzi scheme, did you go into Q-task to look at the

case or any communications --
A. I may have.
Q. Do you recall when that --
A. I may have.
Q. Do you recall when that may have happened?
A. I do not.
Q. Do you recall the first time you looked at the flight manifest to which you referenced earlier?
A. Prior to the investors coming in. I don't remember the date.
Q. Did you instruct anybody, to further your Ponzi scheme, to investigate or check into anyone whose name was listed on the flight manifest?
A. I may have, but with this clarification. If I instructed someone to look into something, I did it without that person knowing that I was involved in a Ponzi scheme or that what they were doing was illegal and it was just to get me additional information to help with my sale of the fake settlements.
Q. So it was to further your --
A. So I may have asked someone -- I may have asked someone to get me some additional information, but as I sit here today, I don't recall ever asking anyone to do anything on the file that was for the purpose of furthering the Ponzi scheme, other than

perhaps getting me a piece of information that I needed.
Q. I'm going to try to refresh your recollection as to whether or not you attended those meeting in July of 2009. And it appears that in between the dates of July 22nd, 2009 and July 24th, 2009, there was a number of communications through e-mail by and between yourself, Mr. Adler, Brad Edwards and Ken Jenne regarding an Epstein meeting that was going to be taking place. Do you remember that at all?
A. I think what you are referring to, and I'm not certain, but I think that what you are referring to is me making sure that the file was in the condition in which I wanted it at the time the investors were coming in. I don't think it had anything to do with the actual functioning of the Epstein case. I think it had to do with my illegitimate purpose. That's the best of my recollection, but if you have documents or something that you can show me, that would be helpful.
Q. We are not privy to all of the e-mails because they've been alleged as privileged or work product, so I unfortunately can't show them to you.
But according to the privilege log between

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1 July 22nd and 23rd there were numerous e-mails sent
2 about the meeting. It was almost an all-hands-on-deck
3 type meeting where everybody needed to attend. It was
4 labelled the Epstein meeting with an Epstein
5 conference room reserved.
6 A. Yes.
7 Okay. What's your question and I will tell
8 you.
9 MR. SCAROLA: First I'm going to object to
10 counsel's testimony, but let's hear the question.
11 BY MS. HADDAD:
12 Q. The question is, does that refresh your
13 recollection as to whether or not this meeting took
14 place?
15 A. To the best of my recollection, I actually
16 had introduced some of the investors to some of the
17 people working on the Epstein case, and that is likely
18 the meeting that you are referring to. But for the
19 life of me, I don't have a specific recollection of
20 it.
21 Q. But it could be the meeting where you
22 introduced the Epstein litigation team to your Ponzi
23 investors?
24 MR. SCAROLA: Excuse me, I'm going to
25 object to the form of the question. It misstates the

1 prior testimony. It has no predicate.
2 BY MS. HADDAD:
3 Q. That could have been the meeting in which
4 you introduced the Ponzi investors to people working
5 on the Epstein case?
6 MR. SCAROLA: Excuse me, counsel. The
7 testimony was that there may have been a meeting at
8 which investors may have been introduced to some
9 people working on the Epstein file. And your efforts
10 continuously to mischaracterize the prior testimony
11 are highly improper. I object.
12 BY MS. HADDAD:
13 Q. Scott, did you or did you not say that you
14 introduced some of the investors to some of the
15 lawyers on the Epstein case?
16 A. No, I actually said, Tonja, that I may have.
17 I have a recollection that I may have based upon you
18 just refreshing my recollection, but I just do not
19 remember one way or the other. This was, in the
20 scheme of what I was doing, insignificant. I was
21 simply trying to establish to the investors that this
22 was a real case, with real potential, with real
23 lawyers working on it. Other than that, it was of no
24 interest to me.
25 Q. How else would you convince them? You've

1 mentioned letting them look through the litigation
2 boxes, you've mentioned the meeting. What other way
3 would you have convinced them that it was a real case?
4 A. I mentioned letting them look at boxes, what
5 they did when I was out of the office, that's -- I
6 don't know because I couldn't see what they were
7 doing. Number two, I may have introduced them to
8 people in the office. Number three, I'm certain that
9 when the people brought the boxes to my office I
10 introduced them to whoever was carrying the boxes.
11 And number four, the rest of it would have been all
12 stuff I created in my imagination because, again, it
13 was the sale of something that didn't exist. This was
14 not settling. There was no real settlement money.
15 There were no real settlement documents. I even
16 manufactured, I think, the actual plaintiff, because I
17 don't recall even knowing the plaintiff's real name or
18 if I did it was of no significance to me.
19 Q. How would you have manufactured a
20 plaintiff's name, would you have created additional
21 documents to further your Ponzi scheme using
22 Mr. Epstein as the defendant?
23 A. No.
24 Q. How would you --
25 A. The name just would have appeared on the

1 confidential settlement agreement.
2 Q. Would they have already seen the documents
3 at that point?
4 A. I can't tell you one way or the other what
5 they had seen, because I don't know what they actually
6 looked at.
7 Q. Forgive me, you've now confused me so I'm
8 just going to ask you for some clarification.
9 You used a legitimate case and created fake
10 settlement documents, correct, in the simplest sense?
11 A. If this culminated in an actual sale of a
12 fake settlement, then the answer is yes.
13 Q. So it was a real case with a real plaintiff
14 and real defendant, just a fake settlement document?
15 A. No. Let me see if I can clarify this for
16 you. Over 90 percent of the settlements that I sold,
17 the fake settlements, were completely fictitious?
18 Q. Right.
19 A. A very small percentage of them were based,
20 at least in part, on some type of real litigation that
21 either had occurred or was currently occurring. I
22 utilized the Epstein case to bolster the visual for
23 the investors that a real case existed. Because as
24 these were being sold to more sophisticated investors,
25 the questions kept coming up, was there -- how do we

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1 know this is a real case? So I was finally able to
2 say this is how you know, here is a case file. I may
3 have, I don't remember specifically one way or the
4 other, but I may have utilized actual plaintiff names
5 from the cases filed, but I may have made them up. I
6 have no specific recollection one way or the other. I
7 was totally geared toward simply getting the investor
8 money into the Ponzi scheme.
9 Q. Were you aware that the day after this
10 meeting took place on July 24th, 2009, a new federal
11 complaint was filed against Epstein with one of the
12 same plaintiffs that was already pending in state
13 court?
14 A. I don't know that I was aware of that or
15 not. If they were filing it, someone may have told
16 me. I don't recall one way or the other.
17 Q. Did you ask anyone to file it to further
18 your Ponzi scheme?
19 A. No, I don't remember doing that.
20 Q. Do you recall any situation where you --
21 A. You do realize -- Tonja, hang on. I just
22 want to make sure this record is clear. Other than
23 Russ Adler, the people that were involved in the
24 Epstein case had absolutely nothing to do with the
25 Ponzi scheme.

1 Q. Directly?
2 A. Or indirectly. They had nothing to do with
3 it.
4 Q. Yet the file was used for you to further
5 your Ponzi scheme. I'm not saying that they gave it
6 to you to use for the Ponzi scheme, I'm asking, you
7 used their case. I'm not -- the question is you used
8 the case?
9 A. I took advantage of some good, innocent
10 people for my own and my co-conspirator's illegal
11 purposes. Mr. Edwards is one of them, and for that I
12 am sorry, Brad.
13 Q. Did you ask anyone involved in the Epstein
14 case to file a federal complaint?
15 MR. SCAROLA: Objection, repetitious.
16 THE WITNESS: Without seeing a document,
17 Tonja, I can't tell you one way or the other. I
18 don't want to -- I do not want to guess. If you have
19 an e-mail where I'm saying to someone, file a federal
20 case, then obviously I did. But I have no specific
21 recollection of that.
22 BY MS. HADDAD:
23 Q. You do have a document with you, it's marked
24 for you, it's Bates stamped. It begins at EP 081 and
25 goes through through 264.

1 A. Hold on one second.
2 Okay. What number am I looking at?
3 Q. It's a very large document. It's begins
4 with Bates Stamp Number 081 and ends with 264.
5 A. It's in the computer, hold on a second.
6 I have that in front of me.
7 Q. Do you see the date on that complaint
8 stamped?
9 A. I do.
10 Q. And there's -- give me one second, Scott,
11 sorry.
12 What was the date that complaint was filed?
13 A. What's the last page of the complaint,
14 what's the Bates number?
15 Q. The last page is 234. I'm sorry, 263 would
16 be the last page of the complaint.
17 [The Complaint referred to was marked for
18 identification as Defendant's Exhibit 1.]
19 MR. SCAROLA: You may want to call his
20 attention to the filing stamp on the first page.
21 MS. HADDAD: I did. I guess he didn't hear
22 me.
23 THE WITNESS: I'm sorry.
24 MS. HADDAD: It's stamped on the first
25 page.

1 THE WITNESS: Hang on, the complaint is
2 dated July 24th, 2009. It was entered onto the
3 docket on July 27th, 2009.
4 MR. SCAROLA: Do you have another question?
5 MS. HADDAD: I thought he was still looking.
6 Scott, are you done looking?
7 THE WITNESS: Yes, one second.
8 MS. HADDAD: That's what I thought.
9 THE WITNESS: No, hang on one second. It
10 shows the stamp on the first page says July 24th,
11 2009. The filing say electronically filed July 24th,
12 2009. There's an entry onto the docket on July 27,
13 2009, and the complaint is signed July 24th, 2009.
14 That's all the dates I have.
15 BY MS. HADDAD:
16 Q. Okay. And back on Bates Stamp Page Number
17 263, who's the attorney that filed this complaint?
18 A. I don't know if that's his signature, but
19 the name is Brad Edwards.
20 Q. Okay. And does that e-mail --
21 A. With the squiggle on top of it.
22 Q. And does that e-mail address look like the
23 correct e-mail address for RRA?
24 A. It is.
25 Q. So that is, in fact, a legitimate e-mail

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address from your firm; is that correct?
A. Yes.
Q. And were you filing any cases back in 2009 in federal court? Do you remember how PACER works?
MR. SCAROLA: Which question would like answered?
THE WITNESS: I don't remember.
MR. SCAROLA: Objection, compound.
BY MS. HADDAD:
Q. Do you remember how PACER worked when you were filing a case, Scott?
A. I actually never actually did the actual electronic filing procedure. I had people that did that. I knew that we could file electronically.
Q. Do you know the purpose of your using your e-mail address when you were filing electronically in federal court?
A. I guess so you can get a receipt, but I have no idea.
Q. Did you ever receive an e-mail from federal court in your e-mail address that showed that a document had been filed with the stamps that you see on the top of that one?
MR. SCAROLA: Counsel, are you attempting --

THE WITNESS: I don't know one way or the other.
MR. SCAROLA: Are you attempting to establish that that complaint was filed in federal court by Brad Edwards?
MS. HADDAD: I'm asking him if he recalls the way it's drafted and why.
MR. SCAROLA: Just ask your question.
MS. HADDAD: I'm asking a question. If you have any objection, please lay it on the record.
MR. SCAROLA: No, what I want to do is try to save some time. If what you are trying to establish is that Brad filed the complaint in federal court on July 24th and used the PACER system, you don't need to ask any more questions about that, it happened.
MR. GOLDBERGER: We appreciate that, but when we depose you we'll ask you that question. But we are deposing Rothstein right now so let her ask her questions. Don't do this speaking stuff, let her ask the questions, okay?
MR. SCAROLA: Maybe.
MR. GOLDBERGER: Okay. Go ahead, Tonja.
BY MS. HADDAD:
Q. Scott, did you ever get e-mails like that

from federal court?
A. I'm certain I did, Tonja. I don't have a specific recollection of getting the one pertaining to this. I don't even know if they sent it to me. I would imagine they'd send it back to Mr. Edwards.
Q. The filing attorney?
A. I suspect, unless the PACER system is registered on my name, then maybe it comes to me, but I am completely guessing.
Q. But based upon the e-mail communications of July 22nd and the meeting occurring on July 23rd, this complaint was filed the day of this meeting; is that correct?
A. Okay. But here is the problem with your question, I don't remember whether or not there actually was a meeting. I said there may have been, and I don't have an independent recollection of this being filed. I do not have an independent recollection of whether I told someone to file this. And for the life of me, this I am certain of, if I told Mr. Edwards to file a complaint in federal court, if there wasn't a legitimate reason for him to do it, he wouldn't have done it.
Q. Do you recall if this federal case was filed when you decided to use the case for your Ponzi scheme

and show it to your investors?
A. It may have been filed around that time, because I haven't been able to establish the exact time. It also certainly may have been utilized by me to further the Ponzi scheme. Also, I don't have an independent recollection of that either. Without seeing e-mail traffic, I can't tell you one way or the other exactly what was going on at that time.
Q. Well, then I'll point you to another e-mail which is marked as EP 001.
MR. EDWARDS: Let me see it.
MS. HADDAD: I sent a copy to your office.
MR. SCAROLA: He would like to see a copy now. Thank you.
[The E-mail referred to was marked for identification as Defendant's Exhibit 2.]
BY MS. HADDAD:
Q. Were you able to find it, Scott?
A. Got it. Yes, I have it.
Q. You have it, okay.
You said Cara Holmes used to be an FBI agent, correct?
MR. SCAROLA: No. What he said is --
THE WITNESS: FBI or IRS.

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BY MS. HADDAD:
Q. Or IRS. We'll use the blanket term federal agent. Is that a fair assessment?
A. Yes.
Q. Thank you.
Do you recall when you hired her to work for you?
A. I do not.
Q. Was it in 2009?
A. I don't have a recollection one way or the other.
Q. Okay. Have you ever seen this e-mail before?
A. I saw it when I was reviewing your exhibits. Before that I have no independent recollection of having seen it. I'm not copied on it so ...
Q. Did you ever have any communications with Ms. Holmes about people that were close to Mr. Epstein?
A. I do not remember.
Q. You stated earlier that you knew that Mr. Epstein was a wealthy man. Is that a fair statement? You called him "collectible," was that because he had money?
MR. SCAROLA: He called him a billionaire

too.
MS. HADDAD: Billionaire.
THE WITNESS: I knew he was a billionaire.
BY MS. HADDAD:
Q. Do you have any independent recollection in the month of July 2009 of this case being intensified in any way such as going after those close to Mr. Epstein?
A. I don't remember that one way or the other.
Q. If you knew that Mr. Epstein was a billionaire, do you have any recollection of asking someone to investigate those close to Mr. Epstein to further your Ponzi scheme?
A. I don't have an independent recollection of that one way or the other.
Q. Do you recall if you ever directed the depositions to be taken of the people who were listed on the flight manifest that you saw?
A. I don't recall one way or the other. I may have told the investors that I was going to take the depositions without ever intending to take them, but I don't recall one way or the other.
Q. Are you familiar with a gentleman by the name of Mr. Rodriguez, Alfredo Rodriguez?
A. No.

Q. Never heard that name before?
A. Alfredo Rodriguez?
Q. Yes.
A. It's not ringing any bells to me.
Q. Do you remember hearing at your office with respect to Mr. Epstein's case that one of his former employees was willing to come forward with a big book of names?
A. I don't remember that one way or the other.
Q. You have no recollection of that.
Do you recall anyone approaching to ask if the office can purchase this book?
A. I don't recall that.
Q. Do you recall instructing any of the attorneys in your office to get an opinion from Kendall Coffey whether or not they can legally and legitimately purchase this book?
A. I don't recall that one way or the other.
[The Complaint referred to was marked for identification as Defendant's Exhibit 3.]
BY MS. HADDAD:
Q. Okay. I'm going to direct your attention to what's now Bates stamped as EP 002, which I'm sure you haven't seen before since you just said you didn't know who he was, but I'll give you a minute to look

over it.
A. This is rather long. Do you want to direct me to a specific portion of it?
Q. Sure. If you look at the Page Bates Stamp EP 004, Paragraph 5 and 6.
A. Okay. I read number five.
Q. Would you please read number six as well?
A. Okay.
Q. Does this refresh your memory as to whether or not anyone ever asked you in your office about purchasing a book?
A. It does not.
Q. Do you know that the cooperating witness was an attorney who worked for you at your firm?
A. I did not know that until you just said it right now.
Q. According to Paragraph Number 5, "The deposition of this Mr. Rodriguez occurred on July 27th, 2009;" is that correct?
MR. SCAROLA: Is it correct that that's what it says? I'm going to object to the form of the question, it's vague and ambiguous.
BY MS. HADDAD:
Q. That's what's listed in the federal complaint, correct?

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A. What does it say? Say it again.
Q. It says, "The first deposition occurred on July 27th," correct?
A. Yes.
Q. Some three days after the federal complaint was filed, correct, that we referenced earlier?
A. That's correct.
Q. And Paragraph 6 clearly delineates that in August 2009 a phone call was received by the cooperating witness that explained that this Mr. Rodriguez had a list of other purported victims or contact information for people who Mr. Edwards could also potentially bring lawsuits for -- on behalf of; is that correct?
A. I don't know one way or the other. You know, Tonja, just so this record is clear, you know, as I'm sitting here, I have a vague recollection of perhaps Ken Jenne coming, talking to me and telling me that someone in my office was going to cooperate with someone in this investigation. But for the life of me, I can't be certain of that. So much time has passed, but as I'm reading this, and it could be completely unrelated to this, I just want to make sure the record is a hundred percent clear, it's possible that Ken Jenne discussed that with me, but I don't

know who it was.
Q. You are testifying that you didn't know it had anything to do with the Epstein case, as you sit here now, you don't remember?
A. No, no, I don't have a specific recollection, and I want to just make sure so I answer all your questions completely, is that as I'm sitting here my recollection was refreshed that I have a vague recollection of having a conversation with Ken Jenne about the fact that someone in our office was going to cooperate as a confidential informant for some law enforcement agency, I just can't remember if it was the Epstein case or not.
Q. Do you recall what you said to Mr. Jenne about that?
A. No. What I just related to you is all I remember. And I'm not even sure it had anything to do with this.
Q. Who's Wayne Black?
A. Who?
Q. Wayne Black.
A. Sounds like the name of someone I hired, but I could be mistaken. I don't recall.
Q. Okay. You don't recall ever meeting Mr. Black?

A. I may have. I don't recall one way or the other. You have something that might refresh my recollection?
Q. Do you know what he does for a living?
A. I do know the name. Sounds familiar to me, but I can't recall one way or the other who he was or what he did.
Q. Did you instruct your office to begin investigating Mr. Epstein's pilot or his airplanes?
A. I do not recall one way or the other.
Q. You did testify that the flight manifest was the one document you recall for sure looking at in Mr. Epstein's case; is that correct?
A. Yes.
Q. And if it did, in fact, contain the names that you are purporting that it claimed or that you knew of, that would be something that would be juicy for the investors to further your Ponzi scheme that it was a collectible case; is that true?
A. I'm sorry, you have to repeat the question, Tonja. I don't understand what you just asked me.
Q. If these big names were on this list, as you seem to recall they were, that would be most helpful to you and your Ponzi scheme investors in convincing them it was a big case, right?

A. If they were on there, or if I lied to them and told them they were on there, or if Adler told me they were on there and I repeated, all those things would have been helpful to the Ponzi scheme.
Q. You stated earlier that you -- the only thing you looked at was the flight manifest because you were told to look at it. Is that still true?
A. That's not what I testified to. I testified that I flipped through other parts of the file and that I didn't remember what I had flipped through. I remember looking at the flight manifest because Mr. Adler told me about it.
Q. You said that you met these investors in your office, but there were no cameras in your office, correct?
A. I didn't have cameras specifically in my office.
Q. You had these investors in your office for this particular Epstein case?
A. Yes.
Q. Do you recall if it was during work hours or after work hours?
A. I do not recall.
Q. Typically when you were meeting with your potential Ponzi investors, did you meet them during

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1 work hours or after work hours?
2 A. Both.
3 Q. Did you always meet with them in your office
4 or did you do it more socially down at Bova or
5 elsewhere?
6 A. Both.
7 Q. But with this particular case, do you recall
8 meeting them at least one time in your office where
9 they could look through the files?
10 A. Actually, that group of investors were
11 looking at a lot of different cases or at least
12 multiple different cases that we were attempting to
13 lure them into the Ponzi scheme utilizing, so I met
14 with them on multiple occasions, both in my office and
15 at restaurants.
16 Q. Who is Mike Fisten?
17 A. Mike Fisten was a law enforcement officer of
18 some type that I hired.
19 Q. Why did you hire him?
20 A. He was a Ken Jenne suggestion.
21 Q. And were you hiring him to start up your
22 company with Mr. Jenne, as you indicated earlier?
23 A. I don't recall what the purpose of hiring
24 him was. It had nothing to do with what Ken Jenne was
25 doing for us.

1 Q. So what did he do at RRA?
2 A. My best recollection is that he had been a
3 former ADT officer and so it would reason that he
4 would be working in our alcohol beverage practice that
5 we were establishing.
6 Q. Do you know if he ever did any work for your
7 firm as an investigator?
8 A. He may have. I don't have a specific
9 recollection one way or the other.
10 Q. Did you ever speak to the press about the
11 Epstein case?
12 A. I don't have a recollection one way or the
13 other.
14 Q. Did you ever have Kip utilize the Epstein
15 case to put any publicity or spin out there with
16 respect to the case?
17 A. I don't have a specific recollection of that
18 one way or the other.
19 Q. Did you ever instruct Brad or Russ to talk
20 to the press about the case? We'll start with Brad
21 then Russ.
22 A. I do not specifically recall getting
23 involved at the publicity level of that case. I don't
24 have a recollection one way or the other.
25 Q. Would that publicity have been good for your

1 Ponzi scheme investors?
2 A. Not really.
3 Q. Would it have given more legitimacy to your
4 allegation that it was a good case in which they
5 should invest?
6 A. In the way that I was selling the Ponzi
7 settlements, it would have likely been overkill.
8 Q. So did you ever instruct them not to speak
9 to the press about the case?
10 A. I don't recall that either one way or the
11 other.
12 Q. If it had gotten out there that the cases
13 had not, in fact, settled, as you were claiming when
14 you were selling the settlement, would that have
15 hindered your case, your Ponzi investor's case?
16 A. Not really because they would have no way of
17 knowing if I had created a fake plaintiff's name. I
18 mean, there could have been something in the news
19 that -- and I don't know that there was -- there could
20 have been something in the news that says none of this
21 settled. And I just simply would have created a fake
22 name with my co-conspirators, created a fake set of
23 settlement documents and handle it that way.
24 Q. Did you know where Mr. Epstein lived?
25 A. I only knew that he was from Palm Beach,

1 other than that, no.
2 Q. Okay. In 2009, did you ever have any firm
3 meetings?
4 A. Of any type?
5 Q. Of any type, in general, firm meetings.
6 A. I'm certain I did.
7 Q. Do you recall about how many?
8 A. I do not recall.
9 Q. Did you ever have any partner meetings?
10 A. Yes.
11 Q. Do you recall how many?
12 A. I do not.
13 Q. Do you recall how many partners you had at
14 the firm in 2009?
15 A. I do not.
16 Q. Do you recall how many fundraisers you had
17 at your home in 2009?
18 A. I do not.
19 Q. More than 10?
20 A. I'd be guessing, Tonja.
21 Q. Okay.
22 A. It's easy enough to check, there's state and
23 federal records of all that stuff.
24 Q. In 2009, did you still require the attorneys
25 from your firm to attend the fundraisers you would

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have?
A. You said "still require," which would have meant that I testified --
Q. Sorry.
A. -- previously that it was requiring them.
Q. Did you require attorneys at your firm to attend your fundraisers?
A. I asked them to, I urged them to, I tried to cajole them into coming, but it wasn't an absolute requirement.
Q. Do you recall between April and July of 2009 how many fundraisers you would have had?
A. I do not.
Q. Did you have fundraisers anywhere besides your home in 2009?
A. I probably did, but I don't recall without seeing the documents. If you have the invitation or the e-mails, that would help me.
Q. Did you hold fundraisers at your office in 2009?
A. I may have. That wouldn't have been unusual, but I don't have a specific recollection.
Q. Did you ever meet any of the plaintiffs in the Epstein case?
A. I don't have a specific recollection of

that.
Q. Do you recall ever revving copies of e-mails from Mr. Jenne with respect to the plaintiffs in the case that the subject matter would say "information we need to use"?
A. I don't recall that one way or the other. It's certainly possible.
Q. Do you recall ever reviewing anything that was titled "causes of action against Epstein"?
A. I do not have a specific recollection of that one way or the other.
Q. Do you recall ever reviewing with Mr. Jenne or any other investigator in your firm any information regarding Mr. Epstein's house staff or airplane staff?
A. I do don't recall that one way or the other. I may have, I may not have.
Q. Who is Bill Berger?
A. A former Palm Beach judge that we hired.
Q. Okay. What was his role at your firm?
A. He was a shareholder.
Q. What kind of practice?
A. Litigating cases.
Q. What kind of practice did he litigate? What kind of cases did he litigate?
A. I don't recall specifically.

Q. When did you hire him?
A. 2008 or 2009. I don't have a specific recollection.
Q. If you hired lawyers who didn't have a book of business, what kind of practice did they do at your office?
A. It depended upon the lawyer. I would have tried to get them to work with other lawyers in an area that they either were proficient in or wanted to become proficient in.
Q. Okay. You had a meeting at your office during which you were asking about information regarding referring attorneys, attorneys who had referred business to the firm. Do you know what I'm talking about? I believe it was back in December of '08 or early 2009.
A. The way you are characterizing that meeting, I had a lot of meetings like that.
Q. What was the purpose of those?
A. You are going to have to be more specific for me, Tonja.
Q. Let's start generally then. What was -- you said you had many meetings like that. Tell me what these meetings were for?
A. Making sure that we were maximizing

generation of business into the law form.
Q. What kind of business, legitimate business or the other --
A. Legitimate business.
Q. Sorry, I couldn't hear you.
A. Legitimate business. The general meetings that you are discussing, that was legitimate business.
Q. So there was a meeting for all attorneys to attend regarding generating business, those meetings were for the legitimate business?
A. If it was addressed to all attorneys, yes.
Q. Okay. And if an e-mail went out to all attorneys, did paralegals and support staff get it as well or was it just directed to the attorneys?
A. Certain support staff probably were on that list, like my CFO and COO, and perhaps my IT people, but it was general for the attorneys.
Q. With respect to your IT people, did you have the capability to review e-mails and internet activity of all of your employees?
A. I did.
Q. Including attorneys?
A. I did.
Q. Did you ever utilize that tool?
A. Very infrequently. It was a pain because I

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had to have Curtis Renie or Bill actually come into my office, set up a special icon to allow me to do that. It was a real pain, so it was rare.

Q. Who else attended the meetings that you had with the Clockwork group with respect to the investors in the Epstein case?

A. There were multiple meetings with what I'll call the Clockwork investors at various points in time. A variety of people came in and out of the meetings. Some of the meetings occurred down in Bova. Other people came up to the meetings. Some of the meetings involved Michael Szafranski, our fake independent verifier. Some of the meetings may have involved bankers and the like. I cannot tell you specifically who was at those meetings.

Q. The specific meetings that we are talking about with -- where you left the boxes at your office, do you recall who else was there with you at that meeting?

A. I only remember there being a handful of people from the investment group and myself. I don't recall -- and I remember the guys bringing the boxes the down, but they didn't stay for the meeting. There may have been other people there, I don't recall one way or the other who it was.

Q. If the expenditures were being made on a case that were substantial, did you have to approve them or did you have a specific practice for them?

A. The head of a practice group could basically approve them but Irene, our CFO, would generally run them by me before she actually cut the check. If I wasn't around she'd run it by Stu.

Q. So as the equity partners you had the authority to make the determination what funds could and could not be expended?

A. As the shareholders, as the two 50 percent shareholders, we controlled the finances.

Q. And if Irene was coming to you to tell you what the funding was for, to get approval rather, would she tell you specifically what the funding was for or just tell you "we need $100,000"?

A. No, if it was a substantial expense --

Q. Tell me what you deem as substantial.

A. That would have been -- substantial to me would have been based upon how much money we had in our coffers at the time. So, if it was one of those periods of time where we had 20 or $30 million floating around the law firm, Irene probably would have just written a check without even letting me know we were writing it. If it was one of those times

where we owed 20, $30 million in Ponzi payments out and she needed to write a check for even $5,000, she probably would have checked with me on that. So substantial and whether or not she would have checked with me depended upon the circumstance at the time.

Q. You stated earlier, and I think I'll get this quote right, that 2009 was a dismal year; is that correct?

A. For the legitimate law firm business, it was a dismal year.

Q. So in the months immediately preceding the dissolution of RRA, July to October of 2009, what would you consider a substantial expense that had to be approved?

A. It would vary literally from day-to-day.

Q. Do you have any independent recollection of how you were doing in, say, July 2009?

A. The legitimate business was always doing poorly in 2009, as far as I was concerned.

Q. So would you have --

A. The Ponzi scheme had its moments of significant wealth and significant poverty, so it varied from time to time. It was a daily thing. Sometimes it was hourly. It just depended upon what was coming in and what needed to go out.

Q. So would you have to utilize the illegitimate funds to fund the legitimate cases at times?

A. Yes.

Q. And that varied daily you said?

A. Well, all the money was commingled together, so we used whatever funds were in there to fund both the legitimate and the illegitimate financial requirements of the firm, the Ponzi scheme and other legitimate and illegitimate things that were going on.

Q. If an outside agency or investigator was being utilized for a case and they needed a signed retainer agreement with your firm, would you have to approve that?

A. It would depend upon the significance of the expense. I didn't necessarily get involved in every retention of every expert in every case.

Q. Okay. So it would depend on the cost or the nature of the case?

A. Who the lawyer was, their level of expertise, all things of that nature.

Q. If it was this gentleman who you have no recollection of meeting, Mr. Black, and the attorney was Mr. Edwards, was that something you needed to look over?

A. Did Wayne Black work for Ron Cacciatore?
Q. Are you asking me --
A. I'm asking anyone in the room who wants to talk to me.
Q. I love to talk to you, but I don't know the answer to that question. He might have. Brad might be able to tell you.
MR. EDWARDS: No.
THE WITNESS: When you said Wayne Black's name again and that I hired him to do something, I seem to think that he may have been associated in some way with Mr. Cacciatore, but I'm not sure one way or the other. I don't remember whether or not I met Mr. Black, it's possible I did, it's also possible I did not. And I don't have an independent recollection of retaining him to do anything or whether I was part and parcel of the decision if we did, in fact, retain him, whether I was part and parcel of the decision to retain him.
BY MS. HADDAD:
Q. Traveling out of state for depositions for the particular cases, did you have to approve that?
A. It would depend upon who the lawyers were, the significance of the expense. It would have been case by case. I certainly would not have been

approving or disapproving Mr. Nurik's travel, Mr. Rosenfeldt's travel, Mr. Boden's travel, Mr. Lippman's travel. That was their own thing.
If a younger lawyer like a Shawn Birken came to me and said he need to travel out of state for something, if it was just for a deposition, I wouldn't have gotten involved in that unless he was telling my CFO, Ms. Stay, that he wanted to fly first class and stay in the Ritz Carlton, then I would have gotten involved. But other than that, no. The firm was too big for me to get involved on a daily basis with all that stuff.
Q. If Brad had to go out of state to take a deposition, you wouldn't be the person to approve or disapprove that?
A. Russ Adler would have handled that. And if there was an issue, Russ would have come to me. And I don't know what the relationship was specifically between Brad and Russ, but it's certainly possible that Brad just was going to go do what he needed to do to properly handle the case and I would have trusted him to do that.
MS. HADDAD: Can we just take a second. We are going to take a minute, okay?
THE WITNESS: Sure.

[Short recess taken.]
FURTHER DIRECT EXAMINATION
BY MR. GOLDBERGER:
Q. All right. Mr. Rothstein, Jack Goldberger, I'm going to ask you some questions now. You testified that you knew Jeffrey Epstein was a billionaire. You did testify to that today, correct?
A. Yes.
Q. Okay. Tell me how you knew that. How did you know that Mr. Epstein was a billionaire?
A. Russ Adler told me. I looked him up on the internet.
Q. What did you look on the internet about Mr. Epstein?
A. I don't recall, but I remember looking up an seeing that he was very wealthy, that he was a billionaire.
Q. Okay. So as far as learning that Mr. Epstein was a billionaire, you learned via two ways, one was from Russ Adler, correct? Is that correct?
A. Yes, sir.
Q. And the other was through looking up Mr. Epstein on the internet, correct?
A. Yes.

Q. Okay. And you don't know what you reviewed on the internet in an effort to determine that Mr. Epstein was a billionaire; is that correct?
A. I do not recall.
Q. Do you know when you did that?
A. I do not.
Q. Was it prior to your needing to use the Epstein case to further your Ponzi scheme?
A. Yes.
Q. Okay. So prior to -- I think you indicated that you needed an influx of money at some point and that's when you decided to use the Epstein case in furtherance of the Ponzi scheme; is that correct?
A. Yes.
Q. So prior to that time though, prior to determining that you needed to use the Epstein case for the Ponzi scheme, you looked up Mr. Epstein and you spoke to Mr. Adler about his work; is that correct?
A. Yes.
Q. Why did you do that, Mr. Rothstein, if you weren't using the Epstein case at that point in your Ponzi scheme?
A. Because it was a legitimate case in the legitimate portion of RRA that I had reason to believe

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1 from speaking to Mr. Adler could bring in a
2 significant amount of money to the firm.
3 Q. At that time Mr. Adler was one of your
4 co-conspirators in the Ponzi scheme; is that correct?
5 A. By this time, yes, sir.
6 Q. Okay. When did Mr. Adler become a
7 co-conspirator in your Ponzi scheme?
8 A. I don't recall the specific date.
9 Q. Was it before or after Mr. Adler recommended
10 that Brad Edwards be hired at your firm?
11 A. Before.
12 Q. So before Brad Edwards was hired at RRA,
13 Russell Adler was a co-conspirator of yours in the
14 illegal part of the RRA firm; is that correct?
15 A. Yes.
16 Q. Then after that time you hired --
17 Mr. Edwards was hired after Adler was your
18 co-conspirator? You are laughing, you are smiling,
19 why is that, sir?
20 A. Because when you say "RRA" that way, the
21 speaker sounds, it sounds like you are roaring.
22 Q. Okay. I'll just say Rothstein, how about
23 that? You know what I'm talking about if I just say
24 Rothstein.
25 A. RRA is fine.

1 Q. Okay. So Adler is your co-conspirator in
2 the Ponzi scheme at the time that Brad Edwards is
3 hired, correct?
4 A. Yes.
5 Q. Okay. Was it Adler who recommended to you
6 that Brad Edwards be hired?
7 A. Yes. He was one of the people.
8 Q. Who else recommended that Edwards be hired?
9 A. I don't have a specific recollection of who
10 it was, but others did.
11 Q. All right. But you have a recollection of
12 Adler being one of the people, so let's talk about
13 that, all right?
14 What did Adler tell you about Brad Edwards
15 when you hired him? Did he tell you that he had these
16 Epstein cases or an Epstein case in the fold?
17 A. Among other things, yes.
18 Q. What else did he tell you?
19 A. Told me he was a great lawyer and a great
20 guy.
21 Q. Did he tell you what his history was, what
22 Edwards' history was prior to coming to the Rothstein
23 firm?
24 A. I'm certain that I asked him, but I don't
25 have a specific recollection of that conversation.

1 Q. What did Adler tell you about the Epstein
2 case that Edwards had at the time you were
3 contemplating hiring him to become a member of the
4 Rothstein firm?
5 A. He told me that it was a huge case involving
6 a billionaire pedophile and that it was a winner.
7 Q. Did you, when you heard that, did you think
8 that that was a case that could become part of your
9 Ponzi scheme?
10 A. No, I actually thought of it as a way to
11 earn legitimate money to help me out of the Ponzi
12 scheme.
13 Q. So at the time you hired Mr. Edwards and you
14 were talking to Adler about Edwards, you were trying
15 to get out from under the Ponzi scheme?
16 A. In the bulk of 2009 I was praying for some
17 sort of legitimate influx of money to get out of the
18 Ponzi scheme.
19 Q. Okay. So now Adler tells you about this
20 Brad Edwards guy, did you know Brad Edwards before
21 Adler talked to you about him? Had you run into him?
22 A. I may have. I don't have a specific
23 recollection one way or the other.
24 Q. Okay. So now he tells you that you should
25 consider hiring Brad Edwards, this is your

1 co-conspirator talking to you, right? Is that
2 correct?
3 A. Yes.
4 Q. And he says, by the way, he's got this great
5 Epstein case involving this billionaire, correct?
6 A. Yes.
7 Q. Presumably then you had a meeting with Brad
8 Edwards when you met him; is that correct?
9 MR. SCAROLA: Presumably he had a meeting
10 when he met him?
11 MR. GOLDBERGER: I'm sorry, Mr. Scarola was
12 cutting you off when you answered, so go ahead, answer
13 again.
14 MR. SCAROLA: I didn't understand the
15 question.
16 BY MR. GOLDBERGER:
17 Q. Do you understand the question,
18 Mr. Rothstein?
19 A. I'm not sure I do because you asked me if I
20 had a meeting when I met him and I think that meeting
21 him is a meeting.
22 Q. Well, there was a meeting, correct?
23 A. I most likely met him before I hired him. I
24 most likely talked to him before I hired him because
25 that was my general way of doing business. It's all

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together possible that I gave Russ the okay to hire him before, I just don't have a specific recollection one way or the other.

Q. At some point, I take it, you learned, whether you sat in on a meeting when Mr. Edwards was hired or whether your co-conspirator hired him, at some point you learned that Mr. Edwards, in fact, had been hired by the firm; is that correct?

A. I'm certain that I gave the final okay to hire him.

Q. Okay. When you were giving the final okay to hire him, I assume there had to be discussion of the money that he was going to be paid, correct?

A. With somebody, yes.

Q. Certainly with Mr. Edwards, right? I assume he wanted to know how much he was getting paid.

A. Yes, but I don't have a specific recollection of whether I discussed that with him or whether I authorized Adler or maybe even Rosenfeldt to discuss it with him. I don't recall.

Q. Do you have the slightest idea how much money Mr. Edwards was paid when he first joined the firm, what his salary was?

A. I don't have an independent recollection.

Q. Generally someone like Mr. Edwards at his

level of accomplishment and his age, you know what the general salary would have been at your firm?

A. It didn't work that way.

Q. I see. Tell me how it worked.

A. It's a case-by-case basis.

Q. Tell me how it worked.

A. Case-by-case basis.

Q. And how did you make that determination on a case-by-case basis?

A. Actual book of business, potential book of business, potentiality for growth, character, what he brought to the table, and obviously a function of how much money we had available at the time.

Q. Okay. And you don't have any recollection of the machinations that occurred in determining what Mr. Edwards salary would be, correct?

A. I do not.

Q. But certainly one of the things you would consider would be the book of business, i.e. the Epstein case, right?

A. I'm certain that I did consider the Epstein case.

Q. Do you know whether he brought any other book of business --

A. But I'm also certain it wasn't the only

factor I considered.

Q. All right. Do you know whether he brought, in his book of business, do you know whether he brought any other cases to the firm other than the Epstein case?

A. I don't recall one way or the other.

Q. Okay. Do you know whether your -- well, bad question, I won't ask that.

Now, you've talked a lot about Ken Jenne here this morning. Was Ken Jenne part of your Ponzi scheme?

A. No, sir.

Q. Had nothing to do with it, right?

A. That's correct.

Q. Other than his having -- working for you as an investigator, he was not one of your co-conspirators, right?

A. He didn't work for me as an investigator, he worked for me heading up our investigative division, heading up our internal security, heading up my personal security, and acting as a political advisor to me.

Q. Okay. Did he serve any kind of investigative function at all, after all, he was a law enforcement officer at one point in his career?

A. I note that he assisted the other people at the firm that were doing the investigative work. I don't know if he personally did investigative work. He may have.

Q. Do you know whether Mr. Jenne, in his role as your advisor or your political consultant, do you know if he was involved in any kind of illegality, illegal wire tapping or anything like that while he was at Rothstein?

MR. SCAROLA: Excuse me, I'm going to object to the form of the question, vague and ambiguous.

THE WITNESS: To my knowledge he was not.

BY MR. GOLDBERGER:

Q. To your knowledge, no?

A. Correct.

Q. Okay. You talked about having a bunch of fundraisers, I know you had a bunch of fundraisers that was kind of a deal at Rothstein. This was kind of a rock star law firm, right? I mean, you had lots of fundraisers, lots of parties, right? Was that the image you were trying to present?

A. In reality that's the way we were.

Q. Okay.

A. A lot of young lawyers having a good time,

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1 trying to make money.
2 Q. And these young lawyers, would you consider
3 Mr. Edwards to be a young lawyer or a middle-aged
4 lawyer?
5 A. Young lawyer.
6 Q. Okay. Was he one of young lawyers that came
7 to these fundraisers at your home?
8 A. I don't recall whether he was there or not.
9 I recall him being at some, but I didn't know if he
10 was at all of them.
11 Q. Okay. You do recall him coming to some of
12 the fundraisers, though, correct?
13 A. I recall him being at my home. It may have
14 been for firm parties or other parties, it may have
15 been for fundraisers there.
16 Q. And that was during the time period that the
17 Ponzi scheme was still going on, correct?
18 A. Yes.
19 Q. Did Adler ever the tell you about any
20 discussions he had with Brad Edwards about the illegal
21 part of the operations at Rothstein?
22 A. Can you reask the question, please?
23 Q. Sure. Sure.
24 Did Russell Adler ever tell you -- Russell
25 Adler is your co-conspirator, we've established that.

1 Did Russell Adler in the furtherance of your
2 conspiracy ever tell you he had discussed with Brad
3 Edwards about the illegal activities at RRA?
4 A. No.
5 Q. Now, you testified when asked about whether
6 the press -- if you were involved in asking the press
7 to run with the Epstein story, you said something to
8 the effect, "the way I was selling the Ponzi scheme it
9 would be overkill."
10 I didn't understand your answer like you
11 didn't understand some of my questions, so I'd like
12 you to kind of tell me what you meant by that.
13 A. I was selling purportedly confidential
14 settlements. Confidentiality was the hallmark of the
15 Ponzi scheme, so too much publicity would have created
16 a problem for me in the sale of what was supposed to
17 be a completely confidential settlement.
18 Q. I think what you are telling me, and I don't
19 want to misstate what I think you are telling me, but
20 is it true that you felt some publicity would be okay
21 but too much would be counter to the purposes of the
22 conspiracy. Is that a fair statement?
23 A. The way I was thinking about it at the time
24 this was going on was that some publicity would assist
25 in establishing for the potential investors that there

1 was a real case going on, but that within that I would
2 have to create some sort of fictions in order to sell
3 the fake product.
4 Q. Okay. At the time that you decided to use
5 the Epstein case as part of your illicit Ponzi scheme
6 theme, I think you testified earlier today, when you
7 were in some dire straights, you needed an influx of
8 money, right?
9 A. Yes.
10 Q. That's when you decided to use the Epstein
11 matters, correct?
12 A. Yes.
13 Q. Okay. And you knew, I assume, being the
14 Ponzi scheme mastermind here, that you needed to make
15 sure that you had at least a working knowledge of the
16 Epstein case so that you could answer questions to the
17 investors. I recognize that you left the room and
18 told them to look at it, but you had to some knowledge
19 of the case, right?
20 MR. SCAROLA: Counsel, that's a
21 misrepresentation of what the earlier testimony was.
22 I object, no proper predicate.
23 MR. GOLDBERGER: Okay, let's go through the
24 whole thing again.
25 MR. SCAROLA: No, you are not going to go

1 through the whole thing again. Just because we have
2 tolerated two lawyers asking questions, does not mean
3 we are going to tolerate two lawyers asking the same
4 questions.
5 MR. GOLDBERGER: Your objection is noted.
6 BY MR. GOLDBERGER:
7 Q. Okay. So let's talk about your need to use
8 the Epstein case to further your conspiracy. You
9 needed an influx of money, did you not?
10 A. Yes.
11 Q. Okay. You decided to use the Epstein case
12 for that purpose, right?
13 A. Yes.
14 Q. And in order to use the Epstein case, you
15 were going to meet with the investors and pitch the
16 Epstein case with the investors, correct?
17 A. Yes.
18 Q. And in an effort to pitch the case to the
19 investors, you had to have some knowledge of the case,
20 did you not?
21 A. Some level of knowledge, yes, sir.
22 Q. Okay. And in order to gain that knowledge,
23 you spoke to your co-conspirator, Russell Adler; is
24 that correct?
25 A. That's one of the things I did.

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1 Q. Okay. And do you remember what Adler told
2 you specifically about the Epstein case that helped
3 you have a basis of information to sell it to the
4 investors?
5 A. Other than him telling me that it was a
6 billionaire pedophile, other than him telling me about
7 the flight manifest, I don't have a specific
8 recollection of what else he told me.
9 Q. Did you actually look at the flight manifest
10 at sometime, Mr. Rothstein?
11 A. Yes, sir.
12 Q. And what was it about those flight manifests
13 that you felt would help you pitch the Epstein case to
14 the investor?
15 A. I don't remember who specifically was on it,
16 but I remember it looking juicy.
17 Q. You don't know who was on it?
18 A. I don't recall.
19 Q. Did you add any names to that manifest at
20 any time?
21 A. I had -- you mean physically write names on
22 there?
23 Q. Any way you want to interpret -- did you --
24 not physically write any names on the manifest, but
25 did you tell the investors that there were names on

1 the manifest that were actually not on the manifest?
2 A. I told the investors that there were other
3 people that appeared on manifests, I don't recall
4 whether it was that manifest or other manifests, and I
5 got the names of those people from Russ Adler.
6 Whether or not they actually appeared on the manifest
7 or another manifest, I do not know.
8 Q. What names did you get from Russ Adler?
9 A. Russ Adler told me that Bill Clinton flew on
10 Mr. Epstein's plane and that Prince Andrew flew on
11 Mr. Epstein's plane.
12 Q. And is it your testimony today that you
13 never looked at the manifest to see whether Bill
14 Clinton or Prince Andrew's name were really on the
15 manifest that you were going to use to pitch the
16 investors?
17 A. It was my understanding they didn't have all
18 the manifests.
19 Q. Okay. Did you ever ask for the manifests
20 that purportedly had the name of Bill Clinton or
21 Prince Andrew on it?
22 A. I probably did, but I don't have a specific
23 recollection one way or the other.
24 Q. When you say you didn't have all the
25 manifests, were all the manifests in your office --

1 were all the manifests within the law firm of RRA and
2 you simply didn't have them in your office?
3 A. I have no idea one way or the other.
4 Q. Okay.
5 A. I did not have them.
6 Q. You were told by Russell Adler that you
7 didn't have -- that you physically didn't have all the
8 manifests, correct?
9 A. That's correct.
10 Q. But you don't know whether they were in the
11 building somewhere, these other supposed manifests?
12 A. I have no idea one way or the other.
13 Q. You never asked for proof that Bill Clinton
14 or Prince Andrew's name were on a manifest somewhere?
15 A. I didn't say that. I may very well have
16 asked Adler or Ken Jenne to find the other manifests.
17 Q. Were you ever shown a manifest with the name
18 Bill Clinton or the name Prince Andrew on them?
19 A. I do not recall one way or the other whether
20 I saw that or not. I remember Adler telling me about
21 it and then me repeating that information to the
22 investors based upon Mr. Adler's representations to
23 me.
24 Q. Now, you testified that you were told that
25 the Epstein cases were "legitimate cases. Do you

1 remember that testimony you gave this morning?
2 A. Yes.
3 Q. And you remember your testimony that you
4 were told they were legitimate cases by both Russ
5 Adler and Brad Edwards, do you remember that?
6 A. I never said that Mr. Edwards or Mr. Adler
7 said, "Scott, these are legitimate cases." I didn't
8 question them as to their legitimacy.
9 Q. You did testify that you talked to Brad
10 Edwards about the Epstein cases; is that correct?
11 MR. SCAROLA: No, counsel, that is a
12 misrepresentation of the earlier testimony.
13 MR. GOLDBERGER: No, it's not.
14 BY MR. GOLDBERGER:
15 Q. Did you talk to Brad Edwards about the
16 Epstein cases?
17 A. I do not recall one way or the other. That
18 was my prior testimony, that's still my testimony. I
19 don't -- I do not recall.
20 Q. We'll let the record speak --
21 A. I know I spoke to Adler about it.
22 Q. We'll let the record speak for itself. Your
23 testimony, as I am questioning you now, is that you do
24 not recall whether you spoke to Brad Edwards about the
25 Epstein cases; is that correct?

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A. If you are including within that me walking past Brad in the hall and saying, "Hey, Brad how are you? How is the Epstein stuff going?" Then it's very likely that I talked to him about it in that manner. But I have no specific recollection one way or the other as to having any lengthy conversations with Mr. Edwards about the case.

I had a co-conspirator who was deeply involved in the Ponzi scheme that I could go to to get any information I wanted, Mr. Adler. I didn't need to go to Mr. Edwards.

Q. So if you had a question of your co-conspirator, Russell Adler, about the Epstein case, you would go ask Adler and would Adler always have the answer for you or would he say he would get you the answer?

A. Both.

Q. When he didn't have the answer, do you know who he was getting the answer from?

MR. SCAROLA: Objection, predicate.

THE WITNESS: I don't know who he was getting it from and I may have contacted other people in the office who were working on the file to ask. I may have asked Mr. Jenne, I may have asked Ms. Holmes, I many have asked a whole myriad of people.

BY MR. GOLDBERGER:

Q. So Ms. Holmes was working on the Epstein cases?

A. It's my refreshed recollection from seeing one of those e-mails that she must have been.

Q. Okay. And Ms. Holmes you said was a former federal law enforcement officer, was that your testimony?

A. Yes.

Q. You don't know whether she was FBI or IRS, correct?

A. I don't remember.

Q. Okay. And upon reflection, do you know whether she was hired without your say-so based on what Mr. Jenne told you or did you meet with her?

A. No, I actually -- I remember meeting with Ms. Holmes.

Q. Okay. What do you remember about that meeting?

A. I remember talking about her relative who was a judge. I remember her telling me about her time in law enforcement. I just don't remember which agency.

Q. Did she tell you why she left law enforcement?

A. She may have, I don't recall one way or the other.

Q. Did you ever ask Ms. Holmes to use any of her prior contacts in law enforcement to assist you in the Ponzi scheme to get information for you?

A. The question is kind of convoluted because the way you are asking it, it seems like you are intimating that Ms. Holmes knew. I may have asked Ms. Holmes to get me information that I was going to utilize with my co-conspirators in the Ponzi scheme, but Ms. Holmes did not know that there was a Ponzi scheme going on.

Q. All right. So you may have asked Ms. Holmes to try and get some information for you from her contacts in law enforcement, but it's your testimony, and I don't dispute it, it's your testimony that she knew nothing about the Ponzi scheme, correct?

A. I may have, I may not have. I do not remember and she absolutely knew nothing about the Ponzi scheme.

Q. Okay. Now, we talked about Brad Edwards getting paid and the multilevel ways in which you determined what a person's salary was. Do you know whether Brad Edwards got any bonuses along the way once the Epstein case was used as part of the Ponzi

scheme?

A. He did not.

Q. So he was --

A. If he got a bonus, it was something he earned.

Q. Did you make a determination as to what that bonus would be?

A. If he got a bonus, I would have been instrumental in determining it. You can determine if he got a bonus by looking at our financial records, I don't have an independent recollection one way or the other.

Q. So you don't know whether he got a bonus at all, correct?

A. That's correct.

Q. So I assume that if he got a bonus you wouldn't know whether it occurred before or after the Epstein case was used as part of the Ponzi scheme?

A. I don't know if he got a bonus, which means I wouldn't know the time frame.

Q. But we would learn -- you are instructing us, we would learn that by looking at when the Epstein case was brought into the Ponzi scheme and we learn that by looking at these -- what was the group that it was used to pitch to?

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A. Clockwork.
Q. So we would look at when the Clockwork group was brought into this and the Epstein case was used then and then we would look at the payroll records to see whether Mr. Edwards got a bonus after the Clockwork group was brought into the Ponzi scheme, correct?
A. From a timing perspective, yes. But Mr. Edwards had nothing to do with the Ponzi scheme, nor was he rewarded even surreptitiously without his knowledge for helping me with the Ponzi scheme. If he was rewarded it was because he deserved, I felt he deserved a reward, having nothing to do with the Ponzi scheme. The bulk of this law firm had nothing to do with the Ponzi scheme.
Q. I think you testified already, though, that money was fundable in the firm, right? I mean, you know, illegal money was used for legitimate purposes, correct?
A. Yes.
Q. Okay. So, for example, investigations that were done with the Epstein case, it's very possible that legitimate Ponzi money was used to finance those investigations?
A. I'd be guessing. It's certainly possible

because all the money went into a whole series of pots, and if you look at, most of the pots were trust accounts. If you look back, you look to see what my CFO, who was also a co-conspirator was doing, she was pulling the money from wherever she needed to to fund whatever she needed to fund.
MR. LAVECCHIO: Off the record a second.
[Discussion off the record.]
BY MR. GOLDBERGER:
Q. Let me circle back to what you needed to learn about the Epstein cases to help make your pitch to the investors.
You talked about the manifest already, correct, the flight manifest?
A. Yes.
Q. Okay. What else did you want to learn about the case or what else did you learn about the case so that you were conversant when you spoke to the investors about the Epstein case?
A. I recall asking someone what the causes of action were.
Q. Okay. Did you understand what they were?
A. I likely did at the time, I don't remember what they were now.
Q. Okay. Do you know which case we are talking

about? By the way, you had a number of Epstein cases in-house, do you know which case you were talking about?
A. As I sit here today, no, sir, I don't remember.
Q. Was it a state case or a federal case?
A. I don't remember one way or the other.
Q. All right.
A. I utilized all those boxes all together. I don't remember which one I sold them.
Q. And the exhibits --
A. It's something completely fictitious that I made up that I told them.
Q. The exhibit that you were shown earlier, Exhibit Number 1, that's the long multi-page federal lawsuit. Do you know whether that was part of the information that you reviewed or shown to the investors when you were pitching to them?
A. I do not remember one way or the other.
Q. Okay. Now, did you make any effort to learn from your co-conspirator who the plaintiffs were in this case, what kind of women they were?
A. Only that they were underage.
Q. Did anyone tell you that these women had -- some of these women had a history of prostitution?

A. They may have told me that, I wouldn't have cared one way or the other.
Q. Why would you not have cared about that, Mr. Rothstein?
A. It had nothing to do with the sale of the Ponzi scheme settlements.
Q. Okay. Were you told by anyone whether any of the women involved as plaintiffs in the case may have worked at adult clubs in the past? I mean strip clubs, let's call it what it is.
A. I may have been told that one way or the other. But again, it had nothing to do with the Ponzi scheme sale of fake settlements.
Q. As part of the information that you were told by you co-conspirator, Russell Adler, were you told that some of the plaintiffs that you had in-house had travelled on Mr. Epstein's airplane?
A. I believe Russ did tell me that.
Q. You know, in fact, that that was not true, correct?
A. I have no idea one way or the other, nor did I care.
Q. But your co-conspirator told you that, right?
A. Mr. Adler did, in fact, tell me that certain

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of the underage women had travelled on Mr. Epstein's plane.
Q. Did you ever meet any of the plaintiffs?
MR. SCAROLA: That's question that's been asked and answered.
THE WITNESS: I do not have a specific recollection of ever meeting them.
MR. SCAROLA: You are exhausting my indulgence.
MR. GOLDBERGER: Fair enough.
MR. SCAROLA: You've exhausted my indulgence.
BY MR. GOLDBERGER:
Q. Do you know whether any of your investigators at the firm had any kind of high tech surveillance equipment or, you know, wire tapping equipment?
A. I believe they did.
Q. Do you know whether this was legal stuff or illegal staff?
A. I did not know, nor did I care.
Q. Do you know if any of that stuff was used to either wire tap or surveil Mr. Epstein?
A. I do not know one way or the other.
Q. What sort of equipment did you know that

they had, meaning your investigators?
A. I had told Mr. Jenne and others involved in the investigation arm of RRA to get whatever equipment they thought they needed and to get the best stuff that they could get. What they actually did, I can't tell you.
Q. You know as part of the Epstein litigation, and I'm talking about now after your using it in the Ponzi scheme, do you know whether anyone at your firm attempted to depose ex-President Bill Clinton?
A. I don't recall that, sir.
Q. Okay. How about Donald Trump, same question?
A. I don't recall that. As a matter of fact, we had represented Trump in some things, we had some pretty close ties with him, so I can't imagine that they would have done that with my authority.
Q. Okay.
A. I don't recall that.
Q. Do you know whether Adler would have -- would Adler have the authorize to do that without getting your permission?
A. The authority, no. Might he have tried, yes.
Q. Okay. How about Alan Dershowitz, do you

have any knowledge of your firm's attempt during the Ponzi scheme to depose Alan Dershowitz?
A. No, sir. I don't have a recollection of one way or the other.
Q. Okay. The name Kendall Coffey was brought up before. Do you know who Kendall Coffey is?
A. Yes.
Q. Who do you know him to be?
A. Former U.S. attorney, current criminal defense lawyer.
Q. Was he a friendship of the firm's?
A. Represented RRA when I fled the country.
Q. So he was a friend of the firm, or a friend of yours at least, right?
A. He wasn't a friend of mine.
Q. A friend of the firm?
A. No idea.
Q. He represented them when I fled the country. I remember him coming in and doing like a show and tell in my office on TV.
MR. GOLDBERGER: Patience gets rewarded. I'm done.
Thank you, Mr. Rothstein. That's all the questions that I have.
THE WITNESS: You are welcome.

CROSS EXAMINATION
BY MR. SCAROLA:
Q. Mr. Rothstein, again, Jack Scarola on behalf of Brad Edwards. I want you to assume that Brad has testified under oath that you never had a substantive discussion with him regarding the Epstein case. Do you have any basis whatsoever to question the accuracy of that testimony?
A. I do not.
Q. I want you to assume that Brad has or will testify under oath that while you were copied on e-mails, you never attended a single legitimate meeting regarding the legitimate prosecution of the Epstein cases. Do you have any basis whatsoever to question the accuracy of that testimony?
A. No, sir.
Q. I want you to assume that Brad has or will testify under oath that you never directed the filing of any documents in the Epstein case, including the July federal complaint that's been marked as an exhibit to your deposition. Do you have any reason whatsoever to question the accuracy of that testimony?
A. No, sir.
Q. I want you to assume that Brad has or will testify under oath that you never directed the taking

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1 of a single deposition, or the propounding of any
2 discovery in the Epstein cases. Do you have any
3 reason to doubt the accuracy of that testimony?
4 A. No, sir.
5 Q. I want you to assume that Brad has or will
6 testify that you did not provide any input whatsoever
7 into the handling of the legitimate Epstein cases. Do
8 you have any reason whatsoever to doubt the accuracy
9 of that testimony?
10 A. No, sir.
11 Q. I want you to assume that Brad has or will
12 testify that you never met any of the legitimate
13 plaintiffs in the Epstein cases. Do you have any
14 reason to doubt the accuracy of that testimony?
15 A. No, sir.
16 MS. HADDAD: I'm going to object to these
17 same questions you keep asking, because Mr. Rothstein
18 has testified at nauseam that he doesn't recall any
19 of this and now you are asking him to bolster
20 Mr. Edwards' either already given or purported
21 testimony when he's testified he doesn't recall it.
22 BY MR. SCAROLA:
23 Q. I want you to assume that Brad has or will
24 testify under oath that you never asked him once to
25 report back to you on any factual matters regarding

1 the Epstein case. Do you have any reason to doubt the
2 accuracy of that testimony?
3 A. No, sir.
4 Q. I want you to assume that Brad has testified
5 repeatedly that he had absolutely no involvement in or
6 knowledge of any illegal activity engaged in by you or
7 any other RRA lawyer. Do you have any reason to doubt
8 the accuracy of that testimony?
9 A. No, sir.
10 Q. I want to talk to you briefly about your
11 personal perceptions of the significance of the
12 testimony that you are giving today. If Brad Edwards
13 had, in fact, been a participant in any of the illegal
14 activities that you have been questioned about at any
15 stage of this very lengthy deposition, and you
16 knowingly concealed Brad Edwards' participation, what
17 do you understand the personal consequences to be as a
18 consequence of your having knowingly concealed Brad
19 Edwards' participation?
20 A. I'll be violating my agreement with the
21 United States government and I would run the risk of
22 dying in prison.
23 Q. If Brad Edwards, contrary to what you have
24 testified under oath and what Brad himself has
25 repeatedly said, knew about anything having to do with

1 illegal activities at the RRA firm and you concealed
2 your knowledge of Brad Edwards' knowledge of that
3 illegal activity, what do you understand the
4 consequences of that false testimony to be?
5 A. I'll be violating my agreement with the
6 United States government and I would run the risk of
7 dying in prison.
8 MR. SCAROLA: Thank you. I don't have any
9 further questions.
10 THE WITNESS: Thank you, sir.
11 MR. NURIK: Mark, I don't know what your
12 time frame is on your litigation, but the ability to
13 receive the transcript, review it and prepare an
14 errata sheet within what is normally the time
15 allotted under the court rules cannot be accomplished
16 in this case.
17 MR. GOLDBERGER: How much time are you
18 generally --
19 MR. NURIK: I don't know.
20 Actually, the first set of errata sheets
21 have just been prepared and finalized for the first
22 deposition in December. I'm not suggesting it will
23 take that long this time, but if you can give me an
24 idea of what your time responsibilities are with the
25 court, what the time limits are --

1 MR. GOLDBERGER: Do you think it will be
2 less than a month, two months?
3 MR. NURIK: I don't think it will be less
4 than a month. First of all, a lot depends on the
5 ability to get the transcript to him to review.
6 MR. GOLDBERGER: Right.
7 MR. NURIK: And that's a whole procedure,
8 it's not normal circumstances that we are dealing
9 with.
10 MR. GOLDBERGER: If time becomes an issue,
11 we'll approach you and ask you to expedite.
12 MR. SCAROLA: Mark, I will tell that from
13 our perspective time is an issue.
14 MR. NURIK: Have at it then, Jack. Do what
15 you need to do to get it done.
16 MR. SCAROLA: There is a long pending
17 motion for summary judgment on Brad's behalf that has
18 been delayed for purposes of taking this deposition.
19 We are very anxious to be able to call that motion
20 for summary judgment up for hearing, so whatever can
21 be done reasonably to expedite the preparation of
22 this portion of this transcript would be appreciated.
23 We understand there are limitations beyond your
24 control, but to the extent you can do it, that would
25 be helpful. Thank you.

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1 MS. HADDAD: It's scheduled in a month,
2 Mark.
3 MR. NURIK: We'll cooperate.
4 MR. SCAROLA: Thank you very much.
5 [Thereupon, the taking of the deposition was
6 concluded at 12:37 p.m.]
7
8
9
10
SCOTT ROTHSTEIN
11 Sworn to and subscribed
before me this day
12 of , 2012.
Notary Public, State
13 of Florida at Large.
14
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24
25

1 CERTIFICATE
2 STATE OF FLORIDA)
COUNTY OF MIAMI-DADE)
3
I, Pearlyck Martin, a Notary Public in and
4 for the State of Florida at Large, do hereby certify
that, pursuant to a Notice of Taking Deposition in
5 the above-entitled cause, SCOTT ROTHSTEIN was by me
first duly cautioned and sworn to testify the whole
6 truth, and upon being carefully examined testified as
is hereinabove shown, and the testimony of said
7 witness was reduced to typewriting under my personal
supervision and that the said Video Conference
8 deposition constitutes a true record of the testimony
given by the witness.
9
I further certify that the said Video
10 Conference deposition was taken at the time and place
specified hereinabove and that I am neither of
11 counsel nor solicitor to either of the parties in
said suit nor interested in the event of the cause.
12
WITNESS my hand and official seal in the
13 City of Miami, County of Dade, State of Florida, this
day of June 19, 2012.
14
15
16
17 Pearlyck Martin
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24
25

1
FRIEDMAN, LOMBARDI & OLSON
2 Suite 924, Biscayne Building
19 West Flagler Street
3 Miami, Florida 33130
Telephone (305) 371-6677
4
June 21, 2012
5
IN RE: EPSTEIN VS EDWARDS
6
SCOTT ROTHSTEIN C/O MARC NURIK
7 One East Broward Boulevard, Seventh Floor
Ft. Lauderdale, Florida 33301
8
Dear SCOTT ROTHSTEIN:
9
With reference to the deposition of
10 yourself taken on June 14, 2012, in connection with
the above-captioned case, please be advised that the
11 transcript of the deposition has been completed and
is awaiting signature.
12
Please arrange to stop by our office for
13 the purpose of reading and signing the deposition.
Our office hours are 9:00 a.m. to 4:00 p.m., Monday
14 through Friday. Please telephone in advance.
15 You may, however, read a copy of the
transcript, provided by any of the attorneys
16 connected with the case, denoting any corrections by
page and line number on a separate sheet of paper.
17 This correction page must be signed by you and
notarized and returned to us for filing with the
18 original.
19 If this has not been taken care of,
however, within the next 30 days, or by the time of
20 trial, whichever comes first, I shall then conclude
that the reading, subscribing and notice of filing
21 have been waived and shall then proceed to deliver
the original of the transcript to ordering attorney
22 without further notice.
23
24
25 Pearlyck Martin

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From: Barbro C Ehnbom[redacted]
Sent: 8/18/2012 4:11:07 PM
To: JEEVACATION@gmail.com
Subject: Fwd: Program & Attendee list
Attachments: SALSS Attendee 2012 FINAL v2.pdf; Untitled attachment 60978.htm; SALSS Program 2012 FINAL.pdf; Untitled attachment 60981.htm

Importance: High

Dear Jeffrey,

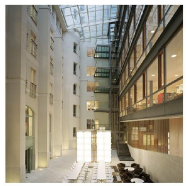
I am sorry I did not call back Yesterday-I was exhausted from a crazy week and fell asleep as soon as I came home! Anyway, here is the full program and attendee list attached, this is the Globalization Summit I invited Bill Clinton to when I met him in Stockholm last Summer-
But he is a bit busy I gather!
Anyway, hope Greta Tufvesson got hold of you re search service? Also, I did see your mail about possibly coming here end of September-however, I am supposedly arranging a fund-raiser for Congress Woman Diana deGette of Colorado on Sept 27 in NYC; she is the only one with a scientific agenda and she is just super-if anything I am hoping on your involvement?
How about going to Stockholm mid or end november..albeit a bit dark and maybe cold..?
Let me know what you think!
Also, I just heard from my friend Jeff Kriendler in Miami and guess who was just walking in there -our friend Goldsamt! First prize for perseverance!
Also, Sofia and the prince is on every magazine here, I think it is wonderful!
Marcus has two big concerts in Stockholm this coming week. Me - SALSS!

KRAM
BE

Barbro C. Ehnbom
Sent from iPad

Vidarebefordrat brev:

Från: Cecilia Schött <[redacted]>
Datum: August 18, 2012 8:44:29 AM GMT+02:00
Till: Barbro Ehnbom <[redacted]>
Ämne: Program & Attendee list



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8TH

SWEDISH AMERICAN LIFE SCIENCE SUMMIT 2012

Program

SALSS 2012

Swedish-American Life Science Summit
Stockholm, Sweden
August 22 - August 24, 2012

The times they are a-changin´

Which global events in the first years of this century will appear in future textbooks of history? My first bet is a gradual change that came about without headlines. When I was born in 1948 we were less than one billion children in the world. Today there are almost two billion aged 0-15 years. The game-changing event in the first decade of this century was that the number of children stopped growing. Two-child families are now the norm for 80% of mankind. The fast population growth will be over around 2050 and at that point only 10% of the 10 billion in the world will live in what was the West. Demographics are major changers of the market place.

My second bet is the G20 meeting in Washington 2008. As the richest needed to borrow money they asked the emerging economies to join and changed their name from G7 to G20. The official photo of the heads of state tells the story. In the middle stands the host, President George W. Bush. On his right is President da Silva and on his left President Jintao and King Abdulla, most probably placed according to their ability to lend money to US in the time of crisis. We know of the lending from Saudi and China. But Brazil has on its own been lending US about 30 billion USD per year since 2008. The economic strength of the world is shifting.

What do the ongoing tectonic shifts in demographics and economy mean for the future of frontline medical research? Will basic medical research be the last to globalize as it requires a unique functional combination of venture capital, institutions and creative individuals? Or will we see tectonic shifts in how the world does basic medical research already in the next decade?

Hans Rosling
Professor, Karolinska Institutet
Time's 100 Most Influential People in the World 2012
Årets Svensk i Världen 2012
SALSS Keynote 2011

HOUSE_OVERSIGHT_0

Program

Evening of August 22, 2012

Hotell Kung Carl Banquet

6:00 p.m. **Welcoming Reception**
Special Recognition to
Dr. Laurent Leksell, *Executive Director, Elekta*

Opening Remarks
Barbro C. Ehnbom, *Chairman, SALSS*

Bollywood Dance Performance

7:30 p.m. **Gold Sponsor Dinner *at Delphi HQ***
(by invitation only)
Hosted by Peter Utterström, *Partner, Delphi*

Morning of August 23, 2012

Ernst & Young Headquarters

8:30 a.m. **Registration & Breakfast**

9:00 a.m. **Setting the Stage**
Dr. William A. Haseltine,
President, ACCESS Health International

9:20 a.m. **Welcoming Remarks**
Michael Treschow,
Chairman, Unilever & Former Chairman, Ericsson

9:30 a.m. **Special Guest Speaker**
Zhiping Cui,
SVP & Head of International Investment,
Shanghai Fosun Pharmaceutical Group

9:45 a.m. ***The Role of Multi-stakeholder Collaborations in Improving Global Health and Care***
Dr. Gary Phillips,
Head Healthcare Industries, World Economic Forum

10:00 a.m. **Company Presentations & Coffee**
Bactiguard
DiaGenic
Serendipity Innovations

11:00 a.m. **Panel: *Successful Cross-Border Collaborations***

Moderator: Dr. William A. Haseltine,
President, ACCESS Health International

Professor Mathias Uhlén,
KTH Royal Institute of Technology
Dr. Laurent Leksell,
Executive Director, Elekta
Dr. Shiang Huang,
CEO, Kindstar
Christian Kinch,
CEO, Bactiguard
William J. Kridel, Jr.,
Managing Director, Ferghana Partners

12:00 noon **Luncheon**
Hosted by Jan Birgerson,
CEO, Ernst & Young Sweden

Luncheon Address:
Ylva Williams,
CEO, Stockholm Science City Foundation

1:30 p.m. ***The Third Place: Healthcare Everywhere***
Patrick Flochel,
Global Pharmaceutical Leader, Ernst & Young

1:45 p.m. ***The Asian Diabetes Epidemic***
Professor Kee Seng Chia,
Dean of Saw Swee Hock School of Public Health,
National University of Singapore

2:00 p.m. ***Innovative Healthcare Delivery Models***
Dr. Nicolaus Henke,
Director & Head of Healthcare Practice,
McKinsey & Company

2:15 p.m. **Company Presentations & Coffee**
Ericsson
Kindstar Global
Oral Care

3:15 p.m. **Panel: *Diabetes - The Healthcare Crisis***

Moderator: Dr. Karin Hehenberger,
EVP & CMO, Coronado Biosciences

Dr. Martin Fitchet,
COO, Janssen Research & Development
Professor Kerstin Brismar,
Karolinska Institutet
Dr. Alan Moses,
Global CMO, Novo Nordisk
Peter Thelin,
Partner, Brummer & Partners

4:15 p.m. **Honorary Guest Speaker**
Dr. Ewa Björling,
Minster for Trade, Swedish Government

Evening of August 23, 2012

M/S Riddarfjärden

7:00 p.m. **Dinner Cruise**
Hosted by Captain Lars Sjögren,
EVP, Danske Bank Sweden

Morning of August 24, 2012

The Museum of Science & Technology

8:00 a.m. **Registration & Breakfast**

8:30 a.m. **Setting the Stage**
G. Steven Burrill,
CEO, Burrill & Company

8:45 a.m. **Hot-Chair Interviews: *Innovation & Capital***

Moderator: G. Steven Burrill,
CEO, Burrill & Company

Dr. Charlotte Brogren,
Director General, VINNOVA & Chairman,
Industrifonden
Dr. Eugen Steiner,
Partner, HealthCap
Anjiang Liu,
Managing Director, International Investment at
Fosun Pharmaceutical U.S. Group

Dr. Yuval Binur,
Managing Partner, Orchestra Medical Ventures
Niels-Jörgen Larsen,
Head of Corporate Finance, Danske Bank Sweden

9:45 a.m. **Company Presentations & Coffee**
Karolinska Development
Medicine in Need (MEND)
Moberg Derma

10:45 a.m. ***Creating a Digital Health System***
Dr. David Blumenthal,
National Coordinator for Health Information
Technology under President Barack Obama from
2009 - 2011

11:00 a.m. **Panel: *How the Digital Revolution Will Create Better Health Care***

Moderator: Magnus Tyreman,
Director Nordics, McKinsey & Company

Karin Johansson,
State Secretary, Ministry of Health & Social Affairs
Professor K. Ganapathy,
President, Telemedicine Society of India
Miguel Blockstrand,
Director Product Line Device Connections,
Ericsson
Dr. Florence Haseltine,
Founder, Society for Women's Health Research
Judy Wade,
CEO, AliveCor

12:00 noon **Special Guest Speaker**
Dr. Tachi Yamada,
CMSO & EVP, Takeda Pharmaceuticals & Former
President of the Global Health Program, The Bill &
Melinda Gates Foundation

12:15 p.m. **Rising Stars Exhibit**
Access Health International
AliveCor
Arocell
BioLamina
Diabetes Tools
Insulution
MedUniverse
Pilljogger
Q-linea

13:15 p.m. **Concluding Luncheon**
Hosted by Magnus Tyreman,
Director Nordics, McKinsey & Company

Special Guest Appearances

Divine Entertainment by Opera Trio Divine

14:30 p.m. **Concluding Remarks**
H.E. Mark F. Brzezinski,
Ambassador, U.S. Embassy in Sweden

Addresses

Hotell Kung Carl
Birger Jarlsgatan 21
Phone: +46 (0)8 463 50 00

Ernst & Young HQ
Jakobsbergsgatan 24
Phone: +46 (0)8 520 590 00

M/S Riddarfjärden
Strandvägskajen 18
Phone: +46 (0)8 24 30 90

The Museum of Science & Technology
Museivägen 7
Phone: +46 (0)8 450 56 00

Transportation

Morning of August 23

Joint morning walk from Hotell Kung Carl to Ernst & Young HQ at 8:00 a.m.

Evening of August 23

A musical promenade is arranged from Hotell Kung Carl to M/S Riddarfjärden at 6:30 p.m.

Morning of August 24

A bus will depart from Hotell Kung Carl at 7:40 a.m. and arrive at The Museum of Science & Techology at 8:00 a.m.

Taxi Stockholm
Phone: +46 (0)8 612 00 00

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For Practical Inquiries:

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jonas@swedishamericanlifescience.com
Phone: +46 (0)70 999 3466

INTELLECTUAL JAZZ

DAVID **AGUS**
DAN **ARIELY**
KEITH **BLACK**
DAVID **BLAINE**
MIKE **BLOCK**
ADAM **BLY**
SCOTT **BOLTON**
DAVID **BROOKS**
MARK **CUBAN**
ANTONIO **DAMASIO**
JACK **DANGERMOND**
DAVE **GALLO**
FRANK **GEHRY**
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NORMAN **LEAR**
YO-YO **MA**
JOHN **MAEDA**
JOHN **MAZZIOTTA**
NICHOLAS **NEGROPONTE**
TODD **OLDHAM**
CRISTINA **PATO**
STEVEN **PINKER**
LISA **RANDALL**
PETER **RAVEN**
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MEGAN **SMITH**
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CRAIG **VENTER**
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EO **WILSON**
DAMIAN **WOETZEL**
STEPHEN **WOLFRAM**
WILL **WRIGHT**
JOSHUA **WURMAN**

RICHARD SAUL **WURMAN**

SCHEDULE

TUES**18**SEPT

Mission Inn Hotel and Spa
3649 Mission Inn Avenue
Riverside, CA 92501
Tel: 951.784.0300
www.missioninn.com

5:00PM **OPENING** in the St. Francis of Assisi Chapel at The Mission Inn

RICHARD SAUL **WURMAN**
YO-YO **MA** and **will.i.am**
C. K. **WILLIAMS** AND STEVEN **PINKER**

7:20PM **WINE** and hors d'oeuvres in the Atrio adjacent to the Chapel

8:30PM **DINNER** in the Galleria at The Mission Inn

WED**19**SEPT

Esri
380 New York Street
Redlands, CA 92373
Tel. 909.793.2853
www.esri.com

7:00AM **Transport** from the Mission Inn to Esri Conference Center

7:15AM **Coffee, Juice** / Esri Conference Center

8:00AM **promptly**

JEFFREY **KATZENBERG** and NORMAN **LEAR**
DAVID **AGUS** and ANTONIO **DAMASIO**
HERBIE **HANCOCK** and **will.i.am**

10:15AM **BREAK**–Esri Café, adjacent to the Conference Center

11:15AM

E.O. **WILSON** and CRAIG **VENTER**
KEITH **BLACK** and DAVID **AGUS**
YO-YO **MA** and MIKE **BLOCK**

1:15PM **LUNCH**–Esri Café, adjacent to the Conference Center

2:45PM

DANNY **HILLIS** and STEPHEN **WOLFRAM**
DAVID **BLAINE** and JULIE **TAYMOR**
MATT **GROENING** and DAVID **BROOKS**

4:45PM **BREAK**–Esri Café, adjacent to the Conference Center
5:15PM **Chinese Telepresence** / Esri Executive Briefing Room

6:00PM

YO-YO **MA** and DAVID **BROOKS**
MARK **CUBAN** and DAN **ARIELY**
QUINCY **JONES** and DAMIAN **WOETZEL**

8:00PM **Transport** to The Mission Inn

8:45PM **DINNER** in the Galleria at The Mission Inn

THURS**20**SEPT

Esri
380 New York Street
Redlands, CA 92373
Tel. 909.793.2853
www.esri.com

7:00AM **Transport** from the Mission Inn to Esri Conference Center

7:15AM **Coffee, Juice** / Esri Conference Center

8:00AM **promptly**

CHARITY **TILLEMANN DICK**
PETER **RAVEN** and JACK **DANGERMOND**
MEGAN **SMITH** and NICHOLAS **NEGROPONTE**
FRANK **GEHRY** and JOHN **MAZZIOTTA**

10:15AM **BREAK**–Esri Café, adjacent to the Conference Center

11:00AM

BENEDIKT **TASCHEN** and JON **KAMEN**
MARY **JORDAN** and MOSHE **SAFDIE**
JOSHUA **WURMAN** and DAVE **GALLO**

1:00PM **LUNCH**–Esri Café, adjacent to the Conference Center

2:15PM

JOHN **MAEDA** and ADAM **BLY**
TODD **OLDHAM** and BJARKE **INGELS**

4:00PM **BREAK**–Esri Café, adjacent to the Conference Center
4:30PM **Chinese Telepresence** / Esri Executive Briefing Room

5:00PM

LISA **RANDALL** and SCOTT **BOLTON**
CRISTINA **PATO**
EO **WILSON** and WILL **WRIGHT**

6:15PM GEOFFREY **WEST** and RICHARD SAUL **WURMAN**

7:15PM **Transport** to The Mission Inn

8:30PM **FAREWELL DINNER** in the Spanish Art Gallery at The Mission Inn

DAVID **AGUS**

David Agus (born January 29, 1965) is an American physician and a co-founder of Navigenics, a personal genetic testing company, and Oncology.com, the largest online cancer resource and virtual community and Applied Proteomics. He is a Professor of Medicine and Engineering at the University of Southern California.

He graduated cum laude in molecular biology from Princeton University and received his medical degree from the University of Pennsylvania School of Medicine in 1991. Agus completed his residency training at Johns Hopkins Hospital and completed his oncology fellowship training at the Memorial Sloan-Kettering Cancer Center in New York. He spent two years at the National Institutes of Health as a Howard Hughes Medical Institute-NIH Research Scholar.

Agus has had a long and varied career. At the Memorial Sloan-Kettering Cancer Center in New York, he was an attending physician in the Department of Medical Oncology and head of the Laboratory of Tumor Biology. He was also Assistant Professor of Medicine at Cornell University Medical Center.

As director of the Spielberg Family Center for Applied Proteomics at Cedars-Sinai Medical Center in Los Angeles, he led a multidisciplinary team of researchers dedicated to the development and use of proteomic technologies to guide doctors in making health-care decisions tailored to individual needs. The center grew out of earlier clinical projects at Cedars-Sinai, where Agus served as an attending physician in oncology, which showed striking differences between the aggressiveness of prostate cancer in certain patients and their ability to respond to treatment.

Agus also served as Director of the Louis Warschaw Prostate Cancer Center, and as an attending physician in the Department of Medicine, Division of Medical Oncology at Cedars-Sinai. He was also an Associate Professor of Medicine at the University of California, Los Angeles (UCLA).

He currently is a Professor of Medicine and Engineering at the Keck School of Medicine of USC and the Viterbi School of Engineering and is the Director of the USC Center for Applied Molecular Medicine and the USC Westside Norris Cancer Center. Agus is co-Director of the newly funded USC-NCI Physical Sciences in Oncology Center together with Danny Hillis. Dr. Agus is an international leader in new technologies and approaches for personalized healthcare, chairs the Global Agenda Council (GAC) on Genetics for the World Economic Forum, and speaks regularly at TEDMED, the Aspen Ideas Festival and the World Economic Forum.

Agus has received many honors and awards, including the American Cancer Society Physician Research Award, a Clinical Scholar Award from the Sloan-Kettering Institute, a CaP CURE Young Investigator Award and the American Cancer Society Clinical Oncology Fellowship Award, the HealthNetwork Foundation's Excellence Award, and the 2009 Geoffrey Beene Foundation's Rock Stars of Science™, as seen in GQ. In 2009, he was selected to serve as a judge for the first Biotech Humanitarian Award.

Agus's research has focused on the application of proteomics and genomics for the study of cancer and the development of new medications for cancer. He has published many scientific articles.

He is a member of several scientific and medical societies, including the American Association for the Advancement of Science, American Association for Cancer Research, American College of Physicians, American Society of Clinical Oncology, American Society of Hematology and the American Medical Association.

Agus was recently named one of the "Future Health 100" by HealthSpottr.

The End of Illness is Agus's first book, was published January, 2012 by the Free Press Division of Simon and Schuster and is a New York Times #1 Bestseller.

Agus is married to Amy Joyce Povich, actress and daughter of syndicated television talk show host Maury Povich. Her stepmother, Connie Chung, is a former CBS News anchor. Agus' grandfather, the late Rabbi Jacob B. Agus, was a theologian and the author of several books on Jewish history and philosophy. Agus has two children, Sydney and Miles.

Agus has one film credit to his name, appearing as "David Agus" in the 2006 documentary "Who Needs Sleep?"

DAN **ARIELY**

Dan Ariely (born April 29, 1968) is an Israeli American professor of psychology and behavioral economics. He teaches at Duke University and is the founder of The Center for Advanced Hindsight. Ariely's talks on TED have been watched 2.8 million times. He is the author of *Predictably Irrational* and *The Upside of Irrationality*, both of which became New York Times best sellers.

Dan Ariely was born in New York City while his father was studying for an MBA degree at Columbia University. The family returned to Israel when he was three. He grew up in Ramat Hasharon. In his senior year of high school, he was active in Hanoar Haoved Vehalomed, an Israeli youth movement. While preparing a ktovet esh (fire inscription) for a traditional nighttime ceremony, the flammable materials he was mixing exploded, causing third-degree burns over 70 percent of his body.

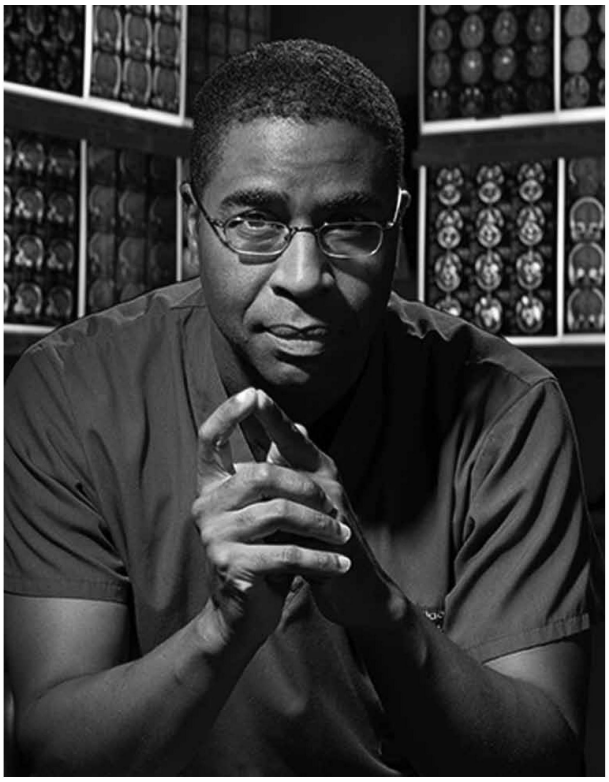
Ariely is married to Sumi, with whom he has two children, a son and a daughter.

Ariely was a physics and mathematics major at Tel Aviv University, but transferred to philosophy and psychology. However, in his last year he dropped philosophy and concentrated solely on psychology, in which he received his B.A. He also holds an M.A. and a Ph.D. in cognitive psychology from the University of North Carolina at Chapel Hill. He completed a second doctorate in business administration at Duke University at the urging of Nobel economic sciences laureate Daniel Kahneman.

After obtaining his Ph.D. degree, he taught at MIT between 1998 and 2008, before returning to Duke University as James B. Duke Professor of Psychology and Behavioral Economics. He was formerly the Alfred P. Sloan Professor of Behavioral Economics at MIT Sloan School of Management. Although he is a professor of marketing with no formal training in economics, he is considered one of the leading behavioral economists. Ariely is the author of the books *Predictably Irrational: The Hidden Forces That Shape Our Decisions* and *The Upside of Irrationality: The Unexpected Benefits of Defying Logic at Work and at Home*. When asked whether reading *Predictably Irrational* and understanding one's irrational behaviors could make a person's life worse (such as by defeating the benefits of a placebo), Ariely responded that there could be a short-term cost, but that there would also likely be long-term benefits, and that reading his book would not make a person worse off.

Ariely's laboratory, the Center of Advanced Hindsight at Duke University, pursues research in subjects like the psychology of money, decision making by physicians and patients, cheating, and social justice.

KEITH **BLACK**



Keith L. Black (born September 13, 1957) is an American neurosurgeon specialising in the treatment of brain tumors and a prolific campaigner for funding of cancer treatment. He is chairman of the neurosurgery department and director of the Maxine Dunitz Neurosurgical Institute at Cedars-Sinai Medical Center in Los Angeles, California.

Keith Black was born in Tuskegee, Alabama. His mother, Lillian, was a teacher and his father, Robert, was the principal at a racially segregated elementary school in Auburn, Alabama; prohibited by law to integrate the student body, Black's father instead integrated the faculty, raised standards, and brought more challenging subjects to the school. Later in his childhood, Black's parents found new jobs and relocated the family to Shaker Heights, Ohio. Black attended Shaker Heights High School. Already interested in medicine, Black was admitted to an apprenticeship program for minority students at Case Western Reserve University, and then became a teenaged lab assistant for Frederick Cross and Richard Jones (inventors of the Cross-Jones artificial heart valve) at St. Luke's Hospital in Cleveland. At 17, he won an award in a national science competition for research on the damage done to red blood cells in patients with heart-valve replacements. According to Black: "I was working in the lab of a heart surgeon who had developed his own artificial heart valve, and I had a concept that the heart valve might be damaging red blood cells, so I asked to do a research project using a scanning electron microscope at the time. When I was trying to basically learn the technique, I took some blood from the heart-lung bypass machine from patients undergoing heart-lung bypass, and when I incubated the red blood cells overnight, I noticed that a certain percentage of these cells change from their normal discoid shape to one that resembled a porcupine, called an econocyte. What I did was to describe the discocyte-econocyte transformation in patients undergoing heart-lung bypass, as an index of sub-lethal red blood cell damage. The importance being that the blood cells could not parachute through the small capillaries." He attended the University of Michigan in a program that allowed him to earn both his undergraduate degree and his medical degree in 6 years. He received his M.D. degree from the University of Michigan Medical School in 1981.

After serving his internship and residency at the University of Michigan, in 1987 he moved to the UCLA Medical Center in Los Angeles, where he later became head of UCLA's Comprehensive Brain Tumor Program. In 1997, after 10 years at UCLA, he moved to Cedars-Sinai Medical Center to head the Maxine Dunitz Neurosurgical Institute. He was also on the faculty of the University of California, Irvine School of Medicine from 1998 to 2003. In 2007 he opened the new Johnnie L. Cochran Jr. Brain Tumor Center at Cedars-Sinai, a research center named after the famous lawyer who had been Black's patient and supporter.

Black has been a frequent subject of media reports on medical advances in neurosurgery. He was featured in a 1996 episode of the PBS program The New Explorers entitled "Outsmarting the Brain". Esquire included him in its November 1999 "Genius Issue" as one of the "21 Most Important People of the 21st Century." He has been cited as an expert in reports about whether mobile phone use affects the incidence of brain tumors. He is also noted for his very busy surgery schedule: a 2004 Discover article noted that he performs about 250 brain surgeries per year, and that at age 46 he had "already performed more than 4,000 brain surgeries, the medical equivalent of closing in on baseball's all-time career hits record." (As of 2009, Black's surgery count had risen to "more than 5,000 operations for resection of brain tumors".)

In 1997, *Time* magazine featured Black on the cover of a special edition called "Heroes of Medicine". The accompanying article described Black's reputation as a surgeon who would operate on tumors that other doctors would not, as well as aspects of his medical research, including his discovery that the peptide bradykinin can be effective in opening the blood–brain barrier.

In 2009 Black published his autobiography, co-authored with Arnold Mann, entitled *Brain Surgeon*. New York Times reviewer Abigail Zuger described the book as a "fascinating, if somewhat stilted, memoir". The Publishers Weekly review commented that the book "examines racial hurdles he had to leap to become a neurosurgeon" and "alternat[es] incisive writing about incisions with his personal memoir, insightful and inspirational."

For more than a decade, David Blaine has been attracting the world's attention with his high-profile endurance stunts. Starting his career as a magician who appeared to do the impossible with a deck of cards, he was soon following in the footsteps of Houdini—seeking out that which seems physically impossible and actually doing it. To that end, he's been buried alive in New York City for a week, barely survived being encased inside a six-ton block of ice for three days and three nights, stood atop a 100-foot-tall pillar in Bryant Park for 36 hours without a safety net, survived inside a transparent box in London on nothing but water for 44 days, and spent one week submerged in a sphere-shaped aquarium at Lincoln Center, at the end of which he attempted to break the world record for breath holding. A year later, he succeeded live on the Oprah Winfrey show, holding his breath for 17 minutes and 4 seconds.

Born in Brooklyn, Blaine discovered his passion for magic at the age of four when he saw a magician perform in the subway. His mother encouraged his passion and he began performing professionally at private parties by the age of thirteen. By the age of twenty-three, Blaine had created, directed, and produced an original television program titled *Street Magic*, which garnered rave reviews by critics and revolutionized the way magic is portrayed on television. Penn Jillette of Penn & Teller called *Street Magic* "the best TV magic special ever done" and "the biggest breakthrough in our lifetime." The *New York Times* noted that David has "taken a craft that's been around for hundreds of years and done something unique and fresh with it." The *New Yorker* claimed that "he saved magic." Since then, Blaine has produced nine additional primetime specials.

Blaine has performed magic privately for U.S. Presidents Bill Clinton and George W. Bush, Governor Arnold Schwarzenegger, Bill Gates, Henry Kissinger, Mayor Bloomberg, Mark Zuckerberg, and Muhammad Ali, as well as President Dmitry Medvedev of Russia and other international leaders. He also performed alongside Michael Jackson, and during the Super Bowl halftime show.

In 2010, Blaine performed magic for 72 hours straight in Times Square, raising nearly $100,000 for relief efforts following the earthquake in Haiti.

Blaine resides in New York City with his fiancée, Alizee Guinochet. The couple welcomed a magical daughter into the world on January 27, 2011.

MICHAEL GLEN **BLOCK**

Michael Glen Block (born May 25, 1982) is an American cellist, composer, arranger, and solo artist hailed as "the ideal musician of the twenty-first century" by cultural icon Yo-Yo Ma. Mike Block has worked with Yo-Yo Ma, Bobby McFerrin, Lenny Kravitz, Shakira, The National, Joe Zawinul, Alison Krauss, Rachel Barton Pine, Mark O'Connor, and other notable musicians. Block currently plays with the Silk Road Ensemble. He has appeared on Late Night with Conan O'Brian, National Public Radio's St. Paul Sunday, Regis and Kelly, VH1, the Disney Channel, WNBC-TV with Chuck Scarborough, and the CBS Early Show.

Block is most famous for playing second cello alongside Yo-Yo Ma. He performed in Mark O'Connor's Appalachia Waltz trio for three years. His performances have been described as "vital, rich-hued solo playing" by the *New York Times*, and "a true artist ... a sight to behold" by the Salt Lake City Desert News.

Mike Block's Cello Concerto, Movement 1 was completed in 2009.

Mr. Block's classical compositions have been performed at the Bremen MusikFest, Tribeca New Music Festival, the Kimmel Center series "Fresh Ink," and the MATA Festival, at which he performed as soloist in his own Cello Concerto in 2009.

His non-classical writing has been featured at festivals such as Rockygrass, Delfest, Celtic Connections, and Wintergrass.

Mike Block has served as musical director to cellist Yo-Yo Ma, singer Bobby McFerrin, ballet star Damien Woetzel, jookin dancer Lil' Buck, actor/comedian Bill Irwin, jazz trumpeter Marcus Printup, world-music group The Silk Road Ensemble, and classical orchestra The Knights.

A frequent guest lecturer, Mr. Block has presented at Stanford University, Princeton University, Harvard University, New York University, Berklee College of Music, Cleveland Institute of Music, Belmont University, Southern Methodist University, Sam Houston State University, Illinois State University, Illinois Wesleyan University, and University of Arkansas. In 2006, he received Suzuki method certification in music education from the New York City-based School for Strings, under Pamela Devenport.

In 2009 Mike founded The Mike Block String Camp, which takes place in multiple locations each summer. The camp's goal is to empower musicians of all ages/levels to perform, improvise, compose, and arrange their own music - all by ear. The first location debuted in 2010 in Vero Beach, Florida, followed in 2011 with Fayetteville, Arkansas, and Saline, Michigan in 2012. The world-class faculty has included Darol Anger, Hanneke Cassel, Joe Craven, Rushad Eggleston, Brittany Haas, Natalie Haas, Jeremy Kittel, Clay Ross, Kimber Ludiker, Jefferson Hamer, Victor Lin, Emy Phelps, and Lauren Rioux.

Since 2009, Mike has been the Lead Teaching Artist for Silk Road Connect, a partnership between the Silk Road Project and schools in New York City and Boston areas.

The Mike Block Band presents an exciting and genre-bending combination of rock, classical, jazz, and folk music through original songs and instrumental compositions, featuring quirky yet honest lyrics, and a variety of musical influences.

Mike Block has also worked with notable musicians such as Edgar Meyer, Mike Marshall, Zakir Hussain, My Brightest Diamond, Bon Iver, Tim O'Brien, Marcel Khaliffe, Goran Bregovic, Kayhan Kalhor and Bruce Molsky.

Triborough Trio—Featuring Mike Block (cello), Hans Holzen (guitar), and Kyle Kegerreis (bass), the trio's mission is to put their personal spin on traditional and contemporary music from around the world in well-crafted and creative arrangements.

Mike is also the Artistic Director and host of GALA Brooklyn: "Global Art - Local Art:", a Music Festival in Brooklyn featuring a diverse array of musicians and artists in unique collaborations.

Notable guests include Anthony Mcgill (Metropolitan Opera), Aoife O'Donovan (singer for Crooked Still), Aaron Dugan (guitarist for Matisyahu), Multi-genre violinist/composer Todd Reynolds, Grammy-Nominated classical artists Anastasia Khitruk (violin), and the Enso Quartet, Marcus Printup from Jazz at Lincoln Center, and jazz saxophonist Seamus Blake, and singer-songwriter Amy Correia.

Performed on WNYC's Soundcheck with John Schaefer.

Mike has also worked with director Yaron Zilberman as a Music Consultant for "A Late Quartet", a 2011 movie starring Philip Seymour Hoffman and Christopher Walken.

On April 4, 2009, Mike Block was struck by a NYC Taxi while walking at the corner of W85th St. and West End Ave, in Manhattan. Injuries included broken rib, jaw, cheek, nose, and he lost nine teeth. His reconstruction required multiple surgeries, and his missing teeth were eventually restored on February 15, 2012.

ADAM **BLY**

Adam Bly (born 1981 in Montreal, Canada) is founder and CEO of Seed. He is the editor of "Science is Culture: Conversations at the New Intersection of Science + Society" (published by HarperCollins) and the creator of the data visualization platform Visualizing.org.

He began his career at the age of 16 as the youngest researcher at the National Research Council of Canada, where he spent three years studying the biochemistry of cancer, specifically the role of cell adhesion in metastasis. Out of the lab, he founded *Seed*—tag-lined "Science is Culture™"—and served as its Editor-in-Chief. "The best comparison for *Seed*," wrote a media critic at the time of the magazine's launch in 2001, "is the early years of *Rolling Stone*, when music was less a subject than a lens for viewing culture." Under his leadership, the magazine earned critical acclaim for modernizing scientific publishing and for bridging long-standing divides between science and society—from art and design to politics and religion. Together with Paola Antonelli he co-founded a monthly gathering of scientists, architects, and designers that laid the foundation for *Design and the Elastic Mind*, an exhibition about science and design at The Museum of Modern Art.

In 2007, Bly was named a Young Global Leader by the World Economic Forum. He is a recipient of the Golden Jubilee Medal from Her Majesty Queen Elizabeth II and his achievements have been highlighted by Canadian Prime Minister Jean Chrétien, "for showing people the scope and power of science not just as an object of study but as a key to understanding the world around us."

Bly has lectured around the world on the future of science and its role in society, including at the World Economic Forum, the National Academies of Science, the Royal Society, the National Institutes of Health, the State Department, NASA, the Chinese Ministry of Science and Technology, The Museum of Modern Art, and The Academy of Sciences for the Developing World, before the National Science Board and the U.S. House of Representatives, and at universities including Harvard, MIT, and Beijing. He has served on the nominating committees and juries of the Buckminster Fuller Challenge, the Earth Award, and the TED Prize, and sits on the Science Advisory Committee of the World Economic Forum, the External Advisory Board of the University of Michigan's Risk Science Center, the American Committee of the Weizmann Institute of Science, the Communications Advisory Board of the National Academy of Sciences, and as an advisor to OECD's Global Project on Measuring the Progress of Societies.

Bly was recently named Vice Chair of the World Economic Forum's Global Agenda Council on Design Innovation and Partner to the Executive Coordination Office for the Rio+20 United Nations Conference on Sustainable Development.

SCOTT **BOLTON**

Dr. Scott Bolton is the Director of the Space Sciences Department at Southwest Research Institute (SwRI) in San Antonio, Texas. Dr. Bolton is also the Principal Investigator for the Juno project, a project within NASA's New Frontiers Program. Prior to being Director at SwRI, Dr. Bolton was a senior scientist and manager at the Jet Propulsion Laboratory (JPL) for over 25 years. During his tenure as Director of Space Science at SwRI, Dr. Bolton oversaw the launches of New Horizons and IBEX, the selection of Juno, the confirmation of MMS, and the delivery of hardware for a number of non-NASA programs related to national security. As director of SwRI's Space Science Department, Dr. Bolton is responsible for the approximately 150 engineers and scientists working on over a dozen programs including new proposals, instrument development, mission operations and scientific data analysis.

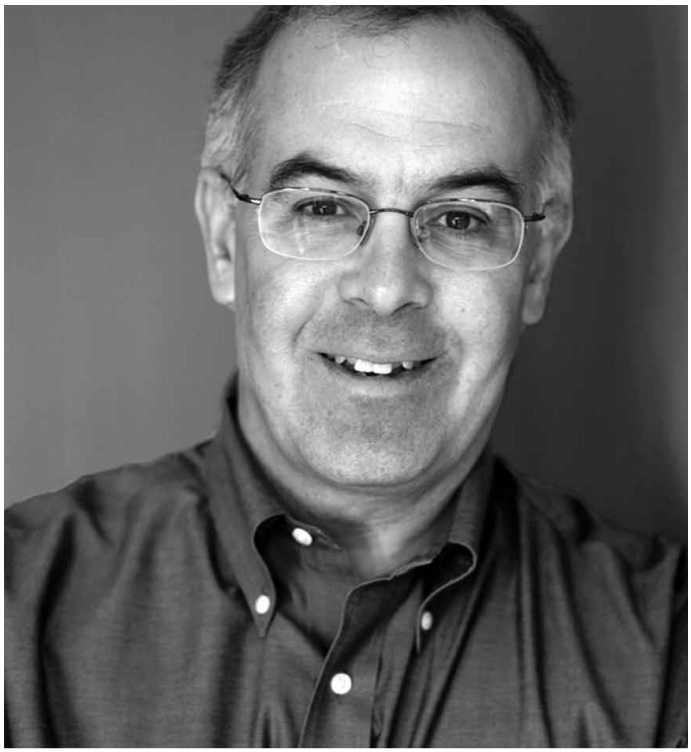
As Principal Investigator of Juno, Dr. Bolton is responsible for all aspects of the Juno program including project management by JPL, spacecraft development at Lockheed Martin, all science instruments, launch vehicle development and operation, and the resulting scientific analysis throughout the life of the project. Dr. Bolton has more than 30 years experience in the field of aerospace and space science. Dr. Bolton received his B.S. in Aerospace Engineering from U. Michigan in 1980, and a Ph.D. in Astrophysics from U.C. Berkeley in 1990.

Dr. Bolton is a Co-Investigator on a number of NASA missions including experiments on the Cassini mission. Dr. Bolton chaired the Titan science group for the Cassini-Huygens mission and was responsible for the formulation of the scientific investigation of Saturn's moon Titan. Dr. Bolton has been a Principal Investigator with NASA on various research programs since 1988. His research includes the modeling of the Jovian and Saturnian radiation belts, atmospheric dynamics and composition, and the formation and evolution of the solar system. He has authored over 150 scientific papers, five book chapters, and consulted/appeared in five space science documentaries. He received the NASA Outstanding Leadership Medal in 2012, Exceptional Achievement Medal in 2002; the NASA Exceptional Scientific Achievement Medal in 1994. He also received JPL Individual Awards for Exceptional Excellence in Leadership in 2002, 2001, and 1996, and Excellence in Management in 2000; and has received sixteen NASA Group Achievement Awards. Dr. Bolton maintains a relationship with JPL and the California Institute of Technology through a special appointment as a Senior Staff Scientist.

Dr. Bolton also leads a number of educational programs aimed at developing science, math and art skills for children from elementary to high school and college level. As part of the NASA Juno educational Outreach Program, Dr. Bolton has dedicated developed educational programs involving both formal and informal education including the

creation of science and math curriculum driving new national standards for elementary level education (an age bracket known to be underserved in this area). Dr. Bolton has worked with a number of corporate sponsors dedicated to space science educational programs, including Lego, Universal, Sony, and Time-Warner. Dr. Bolton helped develope an innovative educational program, in partnership with the Lewis Center for Educational Excellence, that provides an opportunity for elementary to high school level children to experience the scientific and engineering process directly. This program trains teachers on science and math education and provides access to NASA research facilities and scientists for hundreds of schools around the country. Through his private company, Artistic Sciences, Inc, Dr. Bolton's has produced a number of musical concerts, art exhibits, scientific documentaries and videos aimed at inspiring and motivating children in academic studies. He has worked with a number of musical artists developing both educational and musical programs. He is one of the founding members of the Vangelis Foundation in Athens, Greece dedicated to the combined study of Science, Math, Art, Music and Philosophy.

DAVID **BROOKS**



David Brooks (born August 11, 1961) is a political and cultural commentator who writes for The *New York Times*. He worked as an editorial writer and film reviewer for the *Washington Times*; a reporter and later op-ed editor for The *Wall Street Journal*; a senior editor at The *Weekly Standard* from its inception; a contributing editor at *Newsweek* and The *Atlantic Monthly*; and as a commentator on National Public Radio. He is now a columnist for The *New York Times* and commentator on PBS NewsHour.

Brooks, who is Jewish, was born in Toronto, Canada—his father was a U.S. citizen living in Canada at the time—and grew up in New York City in Stuyvesant Town. He graduated from Grace Church School in New York City, Radnor High School (located in a Main Line suburb of Philadelphia) in 1979 and from the University of Chicago, with a degree in history, in 1983.

Brooks edited a 1996 anthology of writings by new conservative writers, *Backward and Upward: The New Conservative Writing*. He wrote a book of cultural commentary titled *Bobos in Paradise: The New Upper Class and How They Got There*, published in 2000, and followed it four years later with *On Paradise Drive: How We Live Now (And Always Have) in the Future Tense*.

He also authored *The Social Animal: The Hidden Sources of Love, Character and Achievement*. The book was excerpted in The *New Yorker* magazine in January 2011 and received mixed reviews upon its full publication, by Random House, in March of that year. The book has been a commercial success, reaching the #3 spot on the Publishers Weekly best-sellers list for non-fiction in April 2011.

Brooks was a visiting professor of public policy at Duke University's Terry Sanford Institute of Public Policy, and he taught an undergraduate seminar there in the fall of 2006.

He and his wife live in the Cleveland Park neighborhood of Northwest Washington, DC.

Brooks describes himself as being originally a liberal before "coming to my senses." In 1983, he wrote a parody of conservative pundit William F. Buckley Jr., which said "In the afternoons he is in the habit of going into crowded rooms and making everybody else feel inferior. The evenings are reserved for extended bouts of name-dropping."

Buckley admired the parody and offered Brooks a job with *National Review*. A turning point in Brooks's thinking came later that year in a televised debate with Milton Friedman, which, as Brooks describes it, "was essentially me making a point, and he making a two-sentence rebuttal which totally devastated my point."

Before the 2003 invasion of Iraq, Brooks argued forcefully for American military intervention, echoing the belief of commentators and political figures that American and British forces would be welcomed as liberators. In the spring of 2004, some of his opinion pieces suggested that he had tempered his earlier optimism about the war.

Brooks' public writing about the U.S. wars in Afghanistan and Iraq is similar to those by neoconservatives, according to a Salon article by Glenn Greenwald, that labels Brooks as a neoconservative. His angry dismissal of the conviction of Scooter Libby as being "a farce" and having "no significance" was derided by political blogger Andrew Sullivan.

On August 10, 2006, Brooks wrote a column for The *New York Times* titled "Party No. 3". The column proposed the idea of the McCain-Lieberman Party, or the fictional representation of the fictional moderate majority in America.

Ottawa Citizen commentator David Warren has identified Brooks as the sort of conservative pundit that liberals like, someone who is "sophisticated" and "engages with" the liberal agenda, in contrast to a real conservative like Charles Krauthammer. Brooks has long been a supporter of John McCain; however, he did not show a liking for McCain's 2008 running mate, Sarah Palin, calling her a "cancer" on the Republican Party. He has referred to her as a "joke," unlikely to ever win the Republican nomination. But he later admitted during a CSPAN interview that he had gone too far in his previous "cancer" comments about Palin, which he regretted, and simply stated he was not a fan of her values.

In a March 2007 article published in The *New York Times* titled "No U-Turns", Brooks explained that the Republican Party must distance itself from the minimal-government conservative principles that had arisen during the Abraham Lincoln, Barry Goldwater, Ronald Reagan and Calvin Coolidge eras. He claims that these core concepts had served their purposes and should no longer be embraced by Republicans in order to win elections, which he considers the most important purpose of a political party designed to serve the political class.

Brooks has been a frequent admirer of President Barack Obama. In an August 2009 profile of Brooks, The *New Republic* describes his first encounter with Obama, in the spring of 2005: "Usually when I talk to senators, while they may know a policy area better than me, they generally don't know political philosophy better than me. I got the sense he knew both better than me. [...] I remember distinctly an image of—we were sitting on his couches, and I was looking at his pant leg and his perfectly creased pant, and I'm thinking, a) he's going to be president and b) he'll be a very good president." Two days after Obama's second autobiography, *The Audacity of Hope*, hit bookstores, Brooks published a column in The *New York Times*, titled "Run, Barack, Run", urging the Chicago politician to run for president. However as of December 2011 in a CSPAN interview, Brook's opinion of Obama's presidency was more tempered, giving Obama only a "B-" rating, and said that Obama's chances of reelection would be less than 50-50 if elections were held at that time.

In writing for The *New York Times* in January 2010, Brooks described Israel as "an astonishing success story". He wrote that "Jews are a famously accomplished group," who, because they were "forced to give up farming in the Middle Ages... have been living off their wits ever since". In Brooks' view, "Israel's technological success is the fruition of the Zionist dream. The country was not founded so stray settlers could sit among thousands of angry Palestinians in Hebron. It was founded so Jews would have a safe place to come together and create things for the world."

Brooks opposes what he sees as self-destructive behavior, such as teenage sex and divorce. His view is that "sex is more explicit everywhere barring real life. As the entertainment media have become more sex-saturated, American teenagers have become more sexually abstemious" by "waiting longer to have sex...[and] having fewer partners." He sees the culture war as nearly over, because "today's young people...seem happy with the frankness of the left and the wholesomeness of the right." As a result, he is optimistic about the United States' social stability, which he considers to be "in the middle of an amazing moment of improvement and repair."

Brooks also broke with many in the conservative movement when, in late 2003, he came out in favor of same-sex marriage in his *New York Times* column. He equated the idea with traditional conservative values: "We should insist on gay marriage. We should regard it as scandalous that two people could claim to love each other and not want to sanctify their love with marriage and fidelity.... It's going to be up to conservatives to make the important, moral case for marriage, including gay marriage."

Regarding abortion, Brooks has advocated for pro-choice government regulations: abortion should be legal, with parental consent for minors, during the first four or five months, and illegal afterward, except in extremely rare circumstances. (*New York Times*, April 22, 2002.)

MARK **CUBAN**

When Mark Cuban purchased the Dallas Mavericks on January 14, 2000, the face of the organization began to change immediately. Once again Mavericks games had a party atmosphere as Reunion Arena rocked with the return of the "Reunion Rowdies." Mavericks games became more than just ordinary NBA games—they were a total entertainment experience.

Cuban was not only successful at instilling a sense of pride and passion into Mavericks fans by presenting himself as the ultimate role model by cheering from the same seats he had in years past, but he also became the first owner in team sports to encourage fan interaction through e-mail on his personal computer. It was through this personal touch that fans throughout the Metroplex, and around the world, began to notice Cuban's energetic personality and take notice of the Mavericks. He has personally responded to thousands of emails, and several suggestions from fans have led to innovative changes such as a new three-sided shot clock, which allows line of site to the 24-second clock from anywhere in the arena.

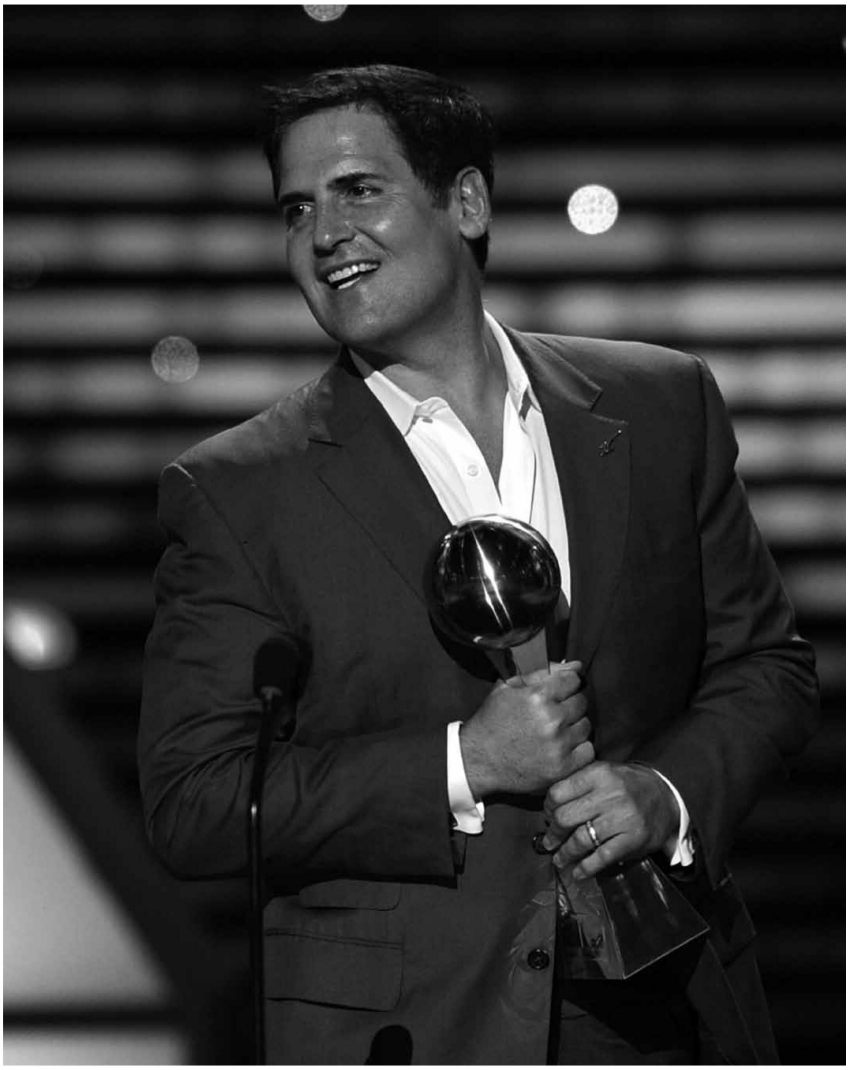
Cuban's whatever-it-takes attitude and commitment to winning has everyone's attention. From his first introduction to the team to the end of his first season as owner, the players responded with a 31-19 record, including a 9-1 mark in April 2000. In addition to hiring special coaches for offense, defense and shooting, Cuban has promised to do everything in his power to improve the team. This goal was achieved as the club finished the 2000-01 season with a 53-29 record en route to their first playoff appearance in 11 years where they became just the sixth team in NBA history to be down 0-2 and come back to win a five-game series vs. Utah in Round 1.

Before the start of the 2001-02 season, American Airlines Center, the Mavs new home, opened and Cuban co-founded HDNet, an all high-definition television network on DIRECTV channel 199 which launched in September 2001. As with his other ventures, Cuban is revolutionizing the television industry with HDNet. He is planning to expand HDNet to include three more networks showing high-def sports, movies and entertainment by the end of 2002.

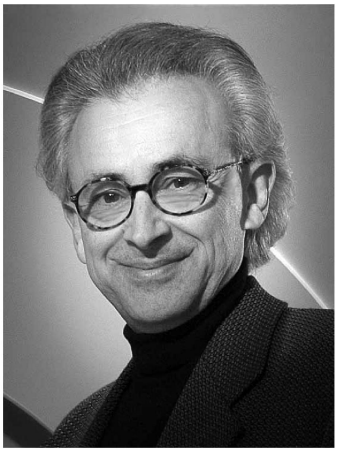
During the Mavs 2001-02 campaign, the team continued their winning ways by finishing the season with a franchise-best record of 57-25 and an NBA-best road record of 27-14, advancing to the postseason for the second-consecutive year.

Prior to his purchase of the Mavericks, Cuban co-founded Broadcast.com, the leading provider of multimedia and streaming on the Internet, in 1995, selling it to Yahoo! in July of 1999. Before Broadcast.com, Cuban co-founded MicroSolutions, a leading National Systems Integrator, in 1983, and later sold it to CompuServe.

Today, in addition to his ownership of the Mavericks, Cuban is an active investor in leading and cutting-edge technologies and continues to be a sought-after speaker.



ANTONIO **DAMASIO**



Antonio Damasio (born February 25, 1944 in Lisbon, Portugal) is a University Professor (an award based on multi-disciplinary interests and significant accomplishments in several disciplines) and David Dornsife Professor of Neuroscience at the University of Southern California, where he heads USC's Brain and Creativity Institute. Prior to taking up his posts at USC, in 2005, Damasio was M.W. Van Allen Professor and Head of Neurology at the University of Iowa Hospitals and Clinics from 1976 to 2005. He is also Adjunct Professor at the Salk Institute.

Damasio is the author of several best-selling books which describe his scientific thinking. "As a leading neuroscientist, Damasio has dared to speculate on neurobiological data, and has offered a theory about the relationship between human emotions, human rationality, and the underlying biology."

Damasio was born in Lisbon and studied medicine at the University of Lisbon Medical School in Portugal, where he also did his neurological residency and completed his doctorate. He worked as a research fellow at the Aphasia Research Center in Boston in 1967, prior to receiving his MD in Lisbon. His work there on behavioural neurology was done under the supervision of the late Norman Geschwind, the Harvard neurologist who created the field.

As a researcher, Damasio's main field is the neurobiology of the mind, especially neural systems which subserve emotion, decision-making, memory, language and consciousness. Damasio's seeks to demonstrate that emotions play a critical role in high level cognition, an idea that ran counter to dominant 20th century views in psychology, neuroscience and philosophy. He showed that emotions and their biological underpinnings are involved in decision-making (both positively and negatively, and often non-consciously); provide the scaffolding for the construction of social cognition; and are required for the self processes which undergird consciousness. "Damasio provides a contemporary scientific validation of the linkage between feelings and the body by highlighting the connection between mind and nerve cells... this personalized embodiment of mind."

He formulated the somatic markers hypothesis, which captures the essence of these ideas. This idea has inspired many systems-neuroscience experiments carried out in laboratories in the U.S. and Europe, and has had a major impact in contemporary science and philosophy. His articles on this topic include: Bechara A, Damasio AR, Damasio H, Anderson S. Insensitivity to future consequences following damage to human prefrontal cortex. Cognition. 50:7-15. 1994; Bechara A, Damasio H, Tranel D, Damasio AR. Deciding advantageously before knowing the advantageous strategy. Science. 275:1293-1294. 1997; Anderson SW, Bechara A, Damasio H, Tranel D, Damasio AR. Impairment of social and moral behaviour related to early damage in human prefrontal cortex. Nature Neuroscience. 2:1032-1037. Damasio has been named by the Institute of Scientific Information as one of the most highly cited researchers in the past decade). Current work on the biology of moral decisions, neuro-economics, social communication, and drug-addiction, has been strongly influenced by Damasio's hypothesis.

Damasio also proposed that emotions are part of homeostatic regulation and are rooted in reward/punishment mechanisms. He recovered James' perspective on feelings as a read-out of body states, but expanded it with an "as-if-body-loop" device which allows for the substrate of feelings to be simulated rather than actual (foreshadowing the simulation process later uncovered by mirror neurons). He demonstrated experimentally that the insular cortex is a critical platform for feelings, a finding that has been widely replicated, and he uncovered cortical and subcortical induction sites for human emotions, e.g. in ventromedial prefrontal cortex and amygdala. He also demonstrated that while the insular cortex plays a major role in feelings, it is not necessary for feelings to occur, suggesting that brain stem structures play a basic role in the feeling process.

He has continued to investigate the neural basis of feelings and demonstrated that although the insular cortex is a major substrate for this process it is not exclusive, suggesting that brain stem nuclei are critical platforms as well. He regards feelings as the necessary foundation of sentience.

In another development, Damasio proposed that the cortical architecture on which learning and recall depend involves multiple, hierarchically organized loops of axonal projections that converge on certain nodes out of which projections diverge to the points of origin of convergence (the convergence-divergence framework). This architecture is applicable to the understanding of memory processes and of aspects of consciousness related to the access of mental contents.

In "The Feeling of What Happens", Damasio lays the foundations of the "enchainment of precedences": "the nonconscious neural signaling of an individual organism begets the protoself which permits core self and core consciousness, which allow for an autobiographical self, which permits extended consciousness. At the end of the chain, extended consciousness permits conscience.

Damasio's research depended significantly on establishing the modern human lesion method, an enterprise made possible by Hanna Damasio's structural neuroimaging/neuroanatomy work complemented by experimental neuroanatomy (with Gary Van Hoesen and Josef Parvizi), experimental neuropsychology (with Antoine Bechara, Ralph Adolphs, and Dan Tranel) and functional neuroimaging (with Kaspar Meyer, Jonas Kaplan, and Mary Helen Immordino-Yang). The experimental neuroanatomy work with Van Hoesen and Bradley Hyman led to the discovery of the disconnection of the hippocampus caused by neurofibrillary tangles in the entophinal cortex of patients with Alzheimer's disease.

As a clinician, he and his collaborators have studied and treated disorders of behaviour and cognition, and movement disorders.

Damasio's books deal with the relationship between emotions and feelings, and what their brain substrates. His 1994 book, *Descartes' Error: Emotion, Reason and the Human Brain*, won the Science et Vie prize, was a finalist for the *Los Angeles Times* Book Award, and is translated in over 30 languages. It is regarded as one of the most influential books of the past two decades. His second book, *The Feeling of What Happens: Body and Emotion in the Making of Consciousness*, was named as one of the ten best books of 2001 by the *New York Times Book Review*, a *Publishers Weekly* Best Book of the Year, a *Library Journal* Best Book of the Year, and has over 30 foreign editions. Damasio's *Looking for Spinoza: Joy, Sorrow, and the Feeling Brain*, was published in 2003. In it, Damasio suggested that Spinoza's thinking foreshadowed discoveries in biology and neuroscience views on the mind-body problem. Spinoza was a protobiologist. His latest book is *Self Comes to Mind: Constructing the Conscious Brain*. In it Damasio suggests that the self is the key to conscious minds and that feelings, from the kind he designates as primordial to the well-known feelings of emotion, are the basic elements in the construction of the protoself and core self. The book received the Corinne International Book Prize.

Damasio is a member of the American Academy of Arts and Sciences, the National Academy of Sciences' Institute of Medicine, and the European Academy of Sciences and Arts. Damasio has received many awards including the Prince of Asturias Award in Science and Technology, the Honda Prize, the Kappers Neuroscience Medal, the Beaumont Medal from the American Medical Association, the Nonino Prize and the Reenpaa Prize in Neuroscience. He has received honorary doctoral degrees (Doctor honoris causa) from the University of Aachen (2002), University of Aveiro (2003), University of Copenhagen (Copenhagen Business School; 2009), University of Leiden (2010), University Ramon Llull, Barcelona (2010), University of Coimbra (2011) and from the EPFL, Lausanne (2011).

His current work involves the social emotions, consciousness and the creative interface between neuroscience and the arts, especially music and film. The role of feelings states on sentience.

Damasio is married to Dr. Hanna Damasio, his colleague and frequent co-author.

Damasio himself notes, in fallibilist fashion, "I have a difficult time seeing scientific results, especially in neurobiology, as anything but provisional approximations"'. Whether despite or because of that fallibilism, Damasio writes in the belief that 'scientific knowledge can be a pillar to help humans endure and prevail'.

OUR HOST

JACK **DANGERMOND**

Jack Dangermond is the founder and president of Esri, the world's fourth largest privately held software company. Founded in 1969 and headquartered in Redlands, California, Esri is widely recognized as the technical and market leader in geographic information systems, or GIS, pioneering innovative solutions for working with spatial data.

Esri has more than one million users in over 350,000 organizations representing government; nongovernmental organizations (NGOs); academia; and industries such as utilities, health care, transportation, telecommunications, homeland security, retail, and agriculture.

Dangermond is recognized not only as a pioneer in spatial analysis methods but also as one of the most influential people in GIS. He actively manages Esri and is closely connected to projects, clients, and company vision. He takes a leadership role in national and global initiatives to facilitate standards for data access and sharing across agencies and organizations. He is personally committed to applying GIS methods for environmental stewardship and sustainable communities.

Dangermond is the recipient of numerous fellowships, honorary degrees, and awards. He has authored hundreds of papers on GIS in such diverse fields as photogrammetry, computer science, planning, environmental science, and cartography. He delivers keynote addresses at meetings and conferences around the globe.

Dangermond's current work is focused on helping organizations deploy spatial data in enterprise environments, Web-based services, and mobile computing systems as well as enhancing applications, models, and tools that can be used for optimized routing, intelligent site selection, crime and disease analysis, location-based services, infrastructure management, public safety, and homeland security.

DAVE **GALLO**

David Gallo is an American oceanographer and Director of Special Projects at the Woods Hole Oceanographic Institution—a preeminent, globally recognized scientific laboratory. For more than 25 years, Dr. Gallo has been at the forefront of ocean exploration, participating in and being witness to the development of new technologies and scientific discoveries that shape our view of planet earth. He has been described by TED Conferences as "an enthusiastic ambassador between the sea and those of us on dry land." With more than 8 million views his TED presentation "Underwater Astonishments" is among the top 5 TED Talks viewed to date.

David has participated in expeditions to all of the world's oceans and was one of the first scientists to use a combination of robots and submarines to explore the deep seafloor. Most recently he co-led an expedition to create the first detailed and comprehensive map of the *RMS Titanic* and he co-led the successful international effort to locate the remains of Air France flight 447.

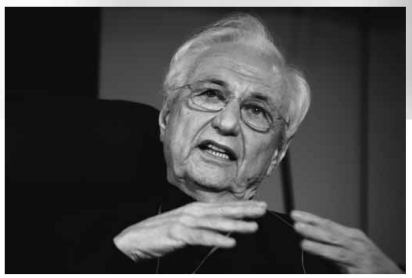
Dr. Gallo is currently active in planning a series of challenging expeditions and is encouraging the development of new technologies for ocean exploration. He is a member of James Cameron's Deep Ocean Task Force and the XPrize Ocean Advisory Board. Almost every expedition into the deep provides results that are often surprising, sometimes startling and in many cases revolutionary.

David is becoming increasingly outspoken about the relationship between humanity and the sea. He feels strongly that instead of taking the oceans for granted we need to recognize the oceans critical role in providing the air we breath, the water we drink, and the food we eat. At the same time, Dr. Gallo feels that human activity has impacted the ocean on a global scale and with significant consequences. The oceans hold the clues to our past and the key to our future yet they remain mostly unexplored and poorly understood.

Dr. Gallo is personally committed to conveying the excitement and importance of ocean exploration to the public-at-large. He has lectured internationally to audiences ranging from children to CEO's with the goal of awakening the little bit of Jacques Cousteau and Jules Vernes that resides in each of us. He has given more than 10 TED and TEDx presentations and has appeared in numerous documentaries (Discovery Channel, History Channel, National Geographic) and has been featured on numerous televised news programs (Weather Channel , PBS Need to Know, MSNBC Ed Show, and NBC Today show).

In recognition of his efforts in exploration and science communications, David was recently elected a fellow of the American Association for the Advancement of Science. He is a National Fellow of the Explorer's Club, a member of the American Geophysical Union, and active on several boards including the Marine Environmental Research Institute, the One World One Ocean Campaign, and the Terramar Project.

FRANK **GEHRY**



Raised in Toronto, Canada, Frank Gehry moved with his family to Los Angeles in 1947. Mr. Gehry received his Bachelor of Architecture degree from the University of Southern California in 1954, and he studied City Planning at the Harvard University Graduate School of Design. In subsequent years, Mr. Gehry has built an architectural career that has spanned five decades and produced public and private buildings in America, Europe and Asia. Hallmarks of Mr. Gehry's work include a particular concern that people exist comfortably within the spaces that he creates, and an insistence that his buildings address the context and culture of their sites and the budgets of his clients.

His work has earned Mr. Gehry several of the most significant awards in the architectural field. He was inducted into the College of Fellows of the American Institute of Architects in 1974, and his buildings have received over 100 national and regional A.I.A. awards. In 1977, Mr. Gehry was named recipient of the Arnold W. Brunner Memorial Prize in Architecture from the American Academy of Arts and Letters. In 1989, he was awarded the Pritzker Architecture Prize, perhaps the premiere accolade of the field, honoring "significant contributions to humanity and the built environment through the art of architecture." In 1992, he received the Wolf Prize in Art (Architecture) from the Wolf Foundation. In the same year, he was named the recipient of the Praemium Imperiale Award by the Japan Art Association to "honor outstanding contributions to the development, popularization, and progress of the arts." In 1994, he became the first recipient of the Dorothy and Lillian Gish Award for lifetime contribution to the arts. In 1998, Mr. Gehry received the National Medal of Arts, and he became the first recipient of the Friedrich Kiesler Prize. In 1999, Mr. Gehry received the Lotos Medal of Merit from the Lotos Club, and he received the Gold Medal from the American Institute of Architects. In 2000, Mr. Gehry received the Gold Medal from the Royal Institute of British Architects, and he received the Lifetime Achievement Award from Americans for the Arts. In 2002, Mr. Gehry received the Gold Medal for Architecture from the American Academy of Arts and Letters. Mr. Gehry was named a Fellow of the American Academy of Arts and Letters in 1987, a trustee of the American Academy in Rome in 1989, and a Fellow of the American Academy of Arts and Sciences in 1991. In 1994, he was bestowed with the title of Academician by the National Academy of Design. In 1998, he was named an Honorary Academician by the Royal Academy of Arts. In 2003, Mr. Gehry was inducted into the European Academy of Sciences and Arts and he was designated as a Companion to the Order of Canada. In 2005 Mr. Gehry received the Ordre National de Legion d'honneur Chevalier from the French Government. In 2006 he was a first year inductee into the California Hall of Fame. In 2008, Mr. Gehry received the Golden Lion Lifetime Achievement Award at the Venice Biennale. In 2010, Mr. Gehry received the John Singleton Copley Award from the American Associates of the Royal Academy Trust, and he received the Cooper Union for the Advancement of Science and Art Award in New York. Mr. Gehry has received honorary doctoral degrees from Occidental College, Whittier College, the California College of Arts and Crafts, the Technical University of Nova Scotia, the Rhode Island School of Design, the California Institute of Arts, the Southern California Institute of Architecture, the Otis Art Institute at the Parsons School of Design, the University of Toronto, the University of Southern California, Yale University, Harvard University, and the University of Edinburgh. Mr. Gehry has held teaching positions at some of the world's most prestigious institutions including Harvard University, University of Southern California, University of California Los Angeles, Sci-Arc, University of Toronto, Columbia University, the Federal Institute of Technology in Zurich, and at Yale University where he still teaches today.

Notable projects include: the Guggenheim Museum in Bilbao, Spain; the DZ Bank Building in Berlin; Nationale-Nederlanden Building in Prague; the Jay Pritzker Pavilion and BP Bridge in Millennium Park in Chicago, Illinois; Maggie's Centre, a cancer patient center in Dundee, Scotland; Hotel Marques de Riscal in El Ciego, Spain; Lou Ruvo Brain Institute in Las Vegas, Nevada; Princeton University Peter B. Lewis Science Library in Princeton, New Jersey; Art Gallery of Ontario Renovation in Toronto, Ontario, Canada; the New World Symphony in Miami, Florida; the Eight Spruce Street Residential Tower located in New York City; and the Walt Disney Concert Hall in Los Angeles, California. Projects under construction include the Signature Theatre in New York City; the Ohr O'Keefe Museums in Biloxi, Mississippi; the Make it Right Foundation in New Orleans, Louisiana, the Puente de Vida Museum of Biodiversity in Panama; the Frederick R. Weisman Art Museum Expansion at the University of Minnesota; and the Foundation Louis Vuitton Museum in Paris, France. Mr. Gehry is also completing work on the Guggenheim Abu Dhabi; LUMA Foundation in Arles, France and the University of Technology, Sydney in Sydney, Australia.

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MATT **GROENING**

Matt Groening was born in Portland, Oregon, on February 15, the third of five children. His father, Homer, was a cartoonist and filmmaker. From an early age, Matt created his own cartoons, amusing his friends and annoying his teachers. Groening attended Evergreen State College in Washington State, where he studied philosophy and continued his interest in cartoons, comics and music.

After his graduation in 1977, Groening headed to Los Angeles where he struggled in immobilizing but irksome poverty. Increasingly frustrated by the traffic, smog, and his landlords, Matt began to vent his angst to his friends by sending them cartoons starring a bug-eyed rabbit named Binky. Groening soon began to publish and sell these cartoons at the record shop where he worked. Their popularity encouraged Matt to syndicate, and in April 1980, Life In Hell® formally debuted in the *Los Angeles Reader*. It was there that he met his future wife, Deborah Caplan, and together they formed Acme Features Syndicate, which today circulates Life in Hell® to more than 250 newspapers around the world in a half-dozen languages.

Life in Hell® has also been collected in a best-selling series of books with over two million copies in print, including *Love is Hell*, *Work is Hell*, *School is Hell*, *Childhood is Hell*, *Akbar & Jeff's Guide to Life*, *Greetings From Hell*, *The Big Book of Hell*, *With Love From Hell*, *How to Go to Hell*, *The Road to Hell*, *Binky's Guide to Love*, and *Love is Still Hell*.

In 1987 James L. Brooks approached Matt about creating animated shorts to fit between sketches of "The Tracey Ullman Show." Matt agreed, but instead of using the Life in Hell® characters, he created an entirely new cast: The Simpsons, which bear the names of his family members, Homer, Marge, Lisa and Maggie (Bart is an anagram for brat).

The Simpsons were soon spun off into a half-hour animated series which first aired on December 17, 1989 with a Christmas special, followed by the series premiere on January 14, 1990. It has since gone on to become the longest running prime-time animated show in television history. An international hit, the series has also spawned a licensing and merchandising empire.

Books based on The Simpsons include *The Simpsons Xmas Book*, *Greetings From The Simpsons*, *The Simpsons Rainy Day Fun Book*, *The Simpsons Uncensored Family Album*, *Maggie Simpson's Alphabet Book*, *Maggie Simpson's Counting Book*, *Maggie Simpson's Book of Colors & Shapes*, *Maggie Simpson's Book of Animals*, *The Simpsons Fun in the Sun Book*, *Making Faces With The Simpsons*, *The Ultra-Jumbo Rain-Or-Shine Fun Book*, *Cartooning With The Simpsons*, *Bart's Guide To Life* and *The Simpsons: A Complete Guide To Our Favorite Family*, a campanion book to the television series.

Groening is also creator and publisher of Bongo Comics and Zongo Comics.

HERBIE **HANCOCK**

Herbie Hancock is a true icon of modern music. Throughout his explorations, he has transcended limitations and genres while maintaining his unmistakable voice. With an illustrious career spanning five decades and 14 Grammy® Awards, including Album of the Year for River: The Joni Letters, he continues to amaze audiences across the globe.

There are few artists in the music industry who have had more influence on acoustic and electronic jazz and R&B than Herbie Hancock. As the immortal Miles Davis said in his autobiography, "Herbie was the step after Bud Powell and Thelonious Monk, and I haven't heard anybody yet who has come after him."

Born in Chicago in 1940, Herbie was a child piano prodigy who performed a Mozart piano concerto with the Chicago Symphony Orchestra at age 11. He began playing jazz in high school, initially influenced by Oscar Peterson and Bill Evans. He also developed a passion for electronics and science, and double-majored in music and electrical engineering at Grinnell College.

In 1960, Herbie was discovered by trumpeter Donald Byrd. After two years of session work with Byrd as well as Phil Woods and Oliver Nelson, he signed with Blue Note as a solo artist. His 1963 debut album, 'Takin' Off', was an immediate success, producing the hit "Watermelon Man."

In 1963, Miles Davis invited Herbie to join the Miles Davis Quintet. During his five years with Davis, Herbie and his colleagues Wayne Shorter (tenor sax), Ron Carter (bass), and Tony Williams (drums) recorded many classics, including 'ESP', 'Nefertiti' and 'Sorcerer'. Later on, Herbie made appearances on Davis' groundbreaking 'In a Silent Way' and 'Bitches Brew', which heralded the birth of jazz-fusion.

Herbie's own solo career blossomed on Blue Note, with classic albums including 'Maiden Voyage', 'Empyrean Isles', and 'Speak Like a Child'. He composed the score to Michelangelo Antonioni's 1966 film 'Blow Up', which led to a successful career in feature film and television music.

After leaving Davis, Herbie put together a new band called The Headhunters and, in 1973, recorded 'Head Hunters.' With its crossover hit single "Chameleon," it became the first jazz album to go platinum.

By mid-decade, Herbie was playing for stadium-sized crowds all over the world and had no fewer than four albums in the pop charts at once. In total, Herbie had 11 albums in the pop charts during the 1970s. His '70s output inspired and provided samples for generations of hip-hop and dance music artists.

Herbie also stayed close to his love of acoustic jazz in the '70s, recording and performing with VSOP (reuniting him with his Miles Davis colleagues), and in duet settings with Chick Corea and Oscar Peterson.

In 1980, Herbie introduced the trumpeter Wynton Marsalis to the world as a solo artist, producing his debut album and touring with him as well. In 1983, a new pull to the alternative side led Herbie to a series of collaborations with Bill Laswell. The first, 'Future Shock', again struck platinum, and the single "Rockit" rocked the dance and R&B charts, winning a Grammy for Best R&B Instrumental. The video of the track won five MTV awards. 'Sound System', the follow-up, also received a Grammy in the R&B instrumental category.

Herbie won an Oscar in 1986 for scoring the film "'Round Midnight", in which he also appeared as an actor. Numerous television appearances over the years led to two hosting assignments in the 1980s: "Rock School" on PBS and Showtime's "Coast To Coast".

After an adventurous 1994 project for Mercury Records, 'Dis Is Da Drum', he moved to the Verve label, forming an all-star band to record 1996's Grammy-winning 'The New Standard'. In 1997, an album of duets with Wayne Shorter, '1+1', was released.

The legendary Headhunters reunited in 1998, recording an album for Herbie's own Verve-distributed imprint, and touring with the Dave Matthews Band. That year also marked the recording and release of 'Gershwin's World', which included collaborators Joni Mitchell, Stevie Wonder, Kathleen Battle, the Orpheus Chamber Orchestra, Wayne Shorter and Chick Corea. 'Gershwin's World' won three Grammys in 1999, including Best Traditional Jazz Album and Best R&B Vocal Performance for Stevie Wonder's "St. Louis Blues."

Herbie reunited with Bill Laswell to collaborate with some young hip-hop and techno artists on 2001's FUTURE2FUTURE. He also joined with Roy Hargrove and Michael Brecker in 2002 to record a live concert album, 'Directions In Music: Live at Massey Hall', a tribute to John Coltrane and Miles Davis.

'Possibilities', released in August 2005, teamed Herbie with many popular artists, such as Sting, Annie Lennox, John Mayer, Christina Aguilera, Paul Simon, Carlos Santana, Joss Stone and Damien Rice. That year, he played a number of concert dates with a re-staffed Headhunters, and became the first-ever Artist-In-Residence at the Tennessee-based festival Bonnaroo.

In 2007, Hancock recorded and released 'River: The Joni Letters', a tribute to longtime friend and collaborator Joni Mitchell featuring Wayne Shorter, guitarist Lionel Loueke, bassist Dave Holland and drummer Vinnie Colaiuta and co-produced by Larry Klein. He enlisted vocalists Norah Jones, Tina Turner, Corinne Bailey Rae, Luciana Souza, Leonard Cohen and Mitchell herself to perform songs she wrote or was inspired by. The album received glowing reviews and was a year-end Top 10 choice for many critics. It also garnered three Grammy Awards, including Album of the Year; Herbie is one of only a handful of jazz musicians ever to receive that honor.

In 2010 Hancock released the critically-acclaimed CD, 'Herbie Hancock's The Imagine Project,' winner of two 2011 Grammy Awards for Best Pop Collaboration and Best Improvised Jazz Solo. Utilizing the universal language of

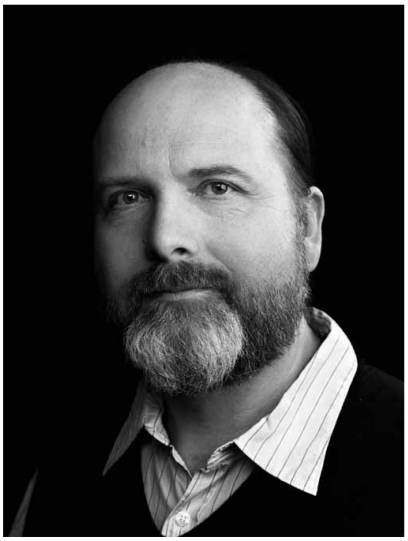
music to express its central themes of peace and global responsibility, the 'Imagine' project was recorded around the world and features a stellar group of musicians including Jeff Beck, Seal,Pink, Dave Matthews, The Chieftains, Lionel Loueke, Oumou Sangare, Konono #1, Anoushka Shankar, Chaka Khan, Marcus Miller, Derek Trucks, Susan Tedeschi, Tinariwen, and Ceu.

Herbie Hancock also maintains a thriving career outside the performing stage and recording studio. Recently named by the Los Angeles Philharmonic as Creative Chair For Jazz, he currently also serves as Institute Chairman of the Thelonious Monk Institute of Jazz, the foremost international organization devoted to the development of jazz performance and education worldwide. Hancock is also a founder of The International Committee of Artists for Peace, and was recently awarded the much esteemed "Commandeur des Arts et des Lettres" by French Prime Minister Francois Fillon.

In July of 2011 Hancock was designated a UNESCO Goodwill Ambassador by UNESCO Director-General Irina Bokova. Recognizing Herbie Hancock's "dedication to the promotion of peace through dialogue, culture and the arts," the Director-General has asked the celebrated jazz musician "to contribute to UNESCO's efforts to promote mutual understanding among cultures, with a particular emphasis on fostering the emergence of new and creative ideas amongst youth, to find solutions to global problems, as well as ensuring equal access to the diversity of artistic expressions." UNESCO's Goodwill Ambassadors are an outstanding group of celebrity advocates who have generously accepted to use their talent and status to help focus the world's attention on the objectives and aims of UNESCO's work in its fields of competence: education, culture, science and communication/information

Now in the fifth decade of his professional life, Herbie Hancock remains where he has always been: in the forefront of world culture, technology, business and music. Though one can't track exactly where he will go next, he is sure to leave his inimitable imprint wherever he lands.

DANNY **HILLIS**



William Daniel "Danny" Hillis (born September 25, 1956, in Baltimore, Maryland) is an American inventor, scientist, engineer, entrepreneur, and author. He co-founded Thinking Machines Corporation, a company that developed the Connection Machine, a parallel supercomputer designed by Hillis at MIT. He is also co-founder of the Long Now Foundation, Applied Minds, Metaweb Technologies, Applied Proteomics, and author of *The Pattern on the Stone: The Simple Ideas That Make Computers Work*.

Danny Hillis was born in Baltimore, Maryland in 1956. His father, William Hillis, was a US Air Force epidemiologist studying hepatitis in Africa and relocated with his family through Rwanda, Burundi, Republic of the Congo, and Kenya. He spent a brief part of his childhood in Calcutta, India when his father was a visiting faculty at ISI, Calcutta. During these years the young Hillis was home schooled by his mother Aryge Briggs Hillis, a biostatistician, and developed an early appreciation for mathematics and biology. His younger brother is David Hillis, a professor of evolutionary biology at the University of Texas at Austin, and his sister is Argye E. Hillis, a professor of neurology at Johns Hopkins University.

In 1978 Hillis graduated from MIT with a BS degree in mathematics, followed in 1981 with an MS degree in Electrical Engineering and Computer Science (EECS), specializing in robotics.

During this time Hillis worked at the MIT Logo Laboratory developing computer hardware and software for children. He designed computer-oriented toys and games for the Milton Bradley Company, and co-founded Terrapin Software—a producer of computer software for elementary schools. He also built a digital computer composed of Tinkertoys that is on display at the Museum of Science, Boston.

Hillis' major research, however, was into parallel computing. Hillis designed the Connection Machine, a parallel supercomputer; in 1983 Hillis co-founded Thinking Machines Corporation to produce and market supercomputers based on this design. In 1988, continuing this research, Hillis received a PhD in EECS from MIT under doctoral advisers Gerald Jay Sussman, Marvin Minsky and Claude Shannon.

Hillis co-founded Thinking Machines Corporation in 1983 while doing his doctoral work at MIT. The company was to develop Hillis' Connection Machine design into commercial parallel supercomputers, and to explore computational pathways to building artificial intelligence. Hillis' ambitions are represented by the company's motto: "We're building a machine that will be proud of us," and Hillis' parallel architecture was to be the main component for this task:

Clearly, the organizing principle of the brain is parallelism. It's using massive parallelism. The information is in the connection between a lot of very simple parallel units working together. So if we built a computer that was more along that system of organization, it would likely be able to do the same kinds of things the brain does.

At Thinking Machines Corporation, Hillis built a technical team with many people that would later become leaders in science and industry including Brewster Kahle, Guy Steele, Sydney Brenner, David Waltz, Jack Schwartz, and Eric Lander. He even recruited Richard Feynman to spend his summers there. For many years, Thinking Machines Corporation connection machines were the fastest computers in the world.

During 1994, however, Thinking Machines filed for bankruptcy. In 1996, after a short stint as a professor at the MIT Media Lab, Hillis joined The Walt Disney Company full time in the newly created role of Disney Fellow and Vice President, Research and Development, Walt Disney Imagineering, which Hillis claimed was an early ambition of his:

I've wanted to work at Disney ever since I was a child...I remember listening to Walt Disney on television describing the 'Imagineers' who designed Disneyland. I decided then that someday I would be an Imagineer. Later, I became interested in a different kind of magic—the magic of computers. Now I finally have the perfect job—bringing computer magic into Disney.

At Disney, Hillis developed new technologies as well as business strategies for Disney's theme parks, television, motion pictures, Internet and consumer products businesses. He also designed new theme park rides, a full sized walking robot dinosaur and various micro mechanical devices.

Hillis left Disney in 2000, taking with him Bran Ferren, President of the Walt Disney Imagineering, R&D Creative Technologies division. Together, Ferren and Hillis founded Applied Minds, a company aimed at providing technology and consulting services to firms in an array of industries, including aerospace, electronics, and toys. In July 2005, Hillis and others from Applied Minds initiated Metaweb Technologies, Inc. to develop a semantic data storage infrastructure for the Internet, and Freebase, an "open, shared database of the world's knowledge". When Metaweb was acquired by Google, the technology became the basis of Google's Knowledge Graph. Hillis, together with Dr. David B. Agus, cofounded a spinoff of Applied Minds called Applied Proteomics Inc which designed and prototyped a machine that measures the level of proteins in the blood for medical diagnosis.

Hillis' work with Agus on cancer led to the founding of the University of Southern California Physical Sciences-Oncology Center (USC PS-OC), funded by the National Cancer Institute (NCI). Hillis is the principle investigator of this program.

In 1993, with Thinking Machines facing its demise, Hillis wrote about long-term thinking and suggested a project to build a clock designed to function for millennia:

When I was a child, people used to talk about what would happen by the year 2000. Now, thirty years later, they still talk about what will happen by the year 2000. The future has been shrinking by one year per year for my entire life. I think it is time for us to start a long-term project that gets people thinking past the mental barrier of the Millennium. I would like to propose a large (think Stonehenge) mechanical clock, powered by seasonal temperature changes. It ticks once a year, bongs once a century, and the cuckoo comes out every millennium.

This clock became the Clock of the Long Now, a name invented by the songwriter and composer, Brian Eno. Hillis wrote an article for Wired magazine suggesting a clock that would last over 10,000 years. The project led directly to the founding of the Long Now Foundation in 1996 by Hillis and others, including Stewart Brand, Brian Eno, Esther Dyson, and Mitch Kapor.

Hillis asserts that parallelism itself is approximately the main ingredient of intelligence; that there is not anything else required to make a mind result from a distributed network of processors. Hillis believes that

...intelligence is just a whole lot of little things, thousands of them. And what will happen is we'll learn about each one at a time, and as we do it, machines will be more and more like people. It will be a gradual process, and that's been happening.

This is not so different from Marvin Minsky's Society of Mind theory, which holds that mind is a collection of agents, each one taking care of a particular aspect of intelligence, and communicating with one another, exchanging information as required.

Some artificial intelligence theorists have other opinions—that it's not the underlying computational mode that's crucial, but rather particular algorithms (of reasoning, memory, perception, etc.). Others argue that the right combination of "little things" is needed to give rise to the overall emergent patterns of coordinated activity that constitute real intelligence.

Hillis is one of a small number of people who have made a serious attempt to create such a "thinking machine" and his ambitions are clear:

"I'd like to find a way for consciousness to transcend human flesh. Building a thinking machine is really a search for a kind of Earthly immortality. Something much more intelligent than we can exist. Making a thinking machine is my way to reach out to that."

Hillis' 1998 popular science book *The Pattern on the Stone* attempts to explain concepts from computer science for laymen using simple language, metaphor and analogy. It moves from Boolean algebra through topics such as information theory, parallel computing, cryptography, algorithms, heuristics, Turing machines, and promising technologies such as quantum computing and emergent systems.

BJARKE **INGELS**

Bjarke Ingels started BIG Bjarke Ingels Group in 2005 after co-founding PLOT Architects in 2001 and working at OMA in Rotterdam. Through a series of award-winning design projects and buildings, Bjarke has developed a reputation for designing buildings that are as programmatically and technically innovative as they are cost and resource conscious. Bjarke has received numerous awards and honors, including the Danish Crown Prince's Culture Prize in 2011, the Golden Lion at the Venice Biennale in 2004, and the ULI Award for Excellence in 2009. In 2011, the Wall Street Journal awarded Bjarke the Architectural Innovator of the Year Award. In 2012, the American Institute of Architects granted the 8 House its Honor Award, calling it "a complex and exemplary project of a new typology."

Alongside his architectural practice, Bjarke taught at Harvard University, Yale University, Columbia University, and Rice University and is an honorary professor at the Royal Academy of Arts, School of Architecture in Copenhagen. He is a frequent public speaker and has spoken in venues such as TED, WIRED, AMCHAM, 10 Downing Street, and the World Economic Forum.

QUINCY **JONES**

An impresario in the broadest and most creative sense of the word, Quincy Jones' career has encompassed the roles of composer, record producer, artist, film producer, arranger, conductor, instrumentalist, TV producer, record company executive, magazine founder, multi-media entrepreneur and humanitarian. As a master inventor of musical hybrids, he has shuffled pop, soul, hip-hop, jazz, classical, African and Brazilian music into many dazzling fusions, traversing virtually every medium, including records, live performance, movies and television.

Celebrating more than 60 years performing and being involved in music, Quincy's creative magic has spanned over six decades, beginning with the music of the post-swing era and continuing through today's high-technology, international multi-media hybrids. In the mid-50's, he was the first popular conductor-arranger to record with a Fender bass. His theme from the hit TV series Ironside was the first synthesizer-based pop theme song. As the first black composer to be embraced by the Hollywood establishment in the 60's, he helped refresh movie music with badly needed infusions of jazz and soul. His landmark 1989 album, Back On The Block—named "Album Of The Year" at the 1990 Grammy Awards—brought such legends as Dizzy Gillespie, Ella Fitzgerald, Sarah Vaughan and Miles Davis together with Ice T, Big Daddy Kane and Melle Mel to create the first fusion of the be bop and hip hop musical traditions; while his 1993 recording of the critically acclaimed Miles and Quincy Live At Montreux, featured Quincy conducting Miles Davis' live performance of the historic Gil Evans arrangements from the Miles Ahead, Porgy and Bess and Sketches of Spain sessions, garnered a Grammy Award for Best Large Jazz Ensemble Performance. As producer and conductor of the historic "We Are The World" recording (the best-selling single of all time) and Michael Jackson's multi-platinum solo albums, Off The Wall, Bad and Thriller (the best selling album of all time, with over 50 million copies sold), Quincy Jones stands as one of the most successful and admired creative artist/executives in the entertainment world.

His 1995 recording, Q's Jook Joint, again showcased Quincy's ability to mold the unique talents of an eclectic group of singers and musicians, in what resulted in a retrospective of his broad and diverse career from that of a seasoned Jazz musician, to skilled composer, arranger, and bandleader, to acclaimed record producer.

A reference to the backwoods club houses of rural America in the 1930's, 40's, and 50's, the platinum selling Q's Jook Joint featured performances by artists such as Bono, Brandy, Ray Charles, Phil Collins, Coolio, Kenny "Babyface" Edmonds, Gloria Estefan, Rachelle Ferrell, Aaron Hall, Herbie Hancock, Heavy D., Ron Isley, Chaka Khan, R. Kelly, Queen Latifah, Tone Loc, the Luniz, Brian McKnight, Melle Mel, Shaquille O'Neal, Joshua Redman, the Broadway musical troupe Stomp, SWV, Take 6, newcomer Tamia, Toots Thielemans, Mervyn Warren, Barry White, Warren Wiebe, Charlie Wilson, Nancy Wilson, Stevie Wonder, Mr. X, and Yo-Yo, among others, and garnered seven Grammy nominations. His recording, From Q, With Love, featured a collection of 26 love songs that he recorded over the last 32 years of his more than 50 year career in the music business.

Named by Time Magazine as one of the most influential jazz musicians of the 20th century, Quincy Jones was born on March 14, 1933, in Chicago and brought up in Seattle. While in junior high school, he began studying trumpet and sang in a gospel quartet at age 12. His musical studies continued at the prestigious Berklee College of Music in Boston, where he remained until the opportunity arose to tour with Lionel Hampton's band as a trumpeter, arranger and sometime-pianist. He moved on to New York and the musical "big leagues" in 1951, where his reputation as an arranger grew. By the mid-50's, he was arranging and recording for such diverse artists as Sarah Vaughan, Ray Charles, Count Basie, Duke Ellington, Big Maybelle, Dinah Washington, Cannonball Adderly and LeVern Baker.

In 1957, Quincy decided to continue his musical education by studying with Nadia Boulanger, the legendary Parisian tutor to American expatriate composers such as Leonard Bernstein and Aaron Copeland. To subsidize his studies he took a job with Barclay Disques, Mercury's French distributor. Among the artists he recorded in Europe were Charles Aznavour, Jacques Brel and Henri Salvador, as well as such visitors from America as Sarah Vaughan, Billy Eckstine and Andy Williams. Quincy's love affair with European audiences continues through the present: in 1991, he began a continuing association with the Montreux Jazz and World Music Festival, which he serves as co-producer.

Quincy won the first of his many Grammy's in 1963 for his Count Basie arrangement of "I Can't Stop Loving You." Quincy's three-year musical association as conductor and arranger with Frank Sinatra in the mid-60's also teamed him with Basie for the classic Sinatra At The Sands, containing the famous arrangement of "Fly Me To The Moon," the first recording played by astronaut Buzz Aldrin when he landed upon the moon's surface in 1969.

When he became vice-president at Mercury Records in 1961, Quincy became the first high-level black executive of an established major record company. Toward the end of his association with the label, Quincy turned his attention to another musical area that had been closed to blacks--the world of film scores. In 1963, he started work on the music for Sidney Lumet's The Pawnbroker and it was the first of his 33 major motion picture scores. In 1985, he co-produced Steven Spielberg's adaptation of Alice Walker's The Color Purple, which garnered eleven Oscar nominations, introduced Whoopi Goldberg and Oprah Winfrey to film audiences, and marked Quincy's debut as a film producer. In 1991 Quincy helped launch NBC-TV's hit series, The Fresh Prince Of Bel Air, for which he served as an executive producer.

In 1990, Quincy Jones formed Quincy Jones Entertainment (QJE), a co-venture with Time Warner, Inc. The new company, which Quincy served as CEO and chairman, had a broad ranging, multi-media agenda which encompassed programming for current and future technologies, including theatrical motion pictures and network, cable and syndicated television. QJE produced NBC Television's Fresh Prince Of Bel Air (now in syndication), and UPN's In The House and Fox Television's Mad TV, among other syndicated shows and television specials. In 1991 Jones founded VIBE Magazine, and with his publishing group VIBE Ventures, would go on to acquire *SPIN* Magazine before divesting his magazine interests.

In January 1992, Quincy Jones executive produced the *An American Reunion* concert at Lincoln Memorial, an all-star concert and celebration that was the first official event of the presidential inaugural celebration and drew widespread acclaim as an HBO telecast.

On March 25, 1996, Quincy Jones, executive produced the most watched awards show in the world, the 68th Annual Academy Awards. The show received widespread acclaim as one of the most memorable Academy Award shows in recent years.

In 1997, Quincy Jones formed the Quincy Jones Media Group. QJMG's feature film projects in development include such highly anticipated films as the adaptations of the Ralph Ellison novel *Juneteeth*, David Halberstam's *The Children* for Home Box Office in association with producers Kathleen Kennedy and Frank Marshall, a bio-pic on the 19th century Russian poet Alexander Pushkin, *Pimp and Seeds of Peace* for Showtime, among others. For television, QJMG is developing the sit-com The White Guy. QJMG is also active in live entertainment, direct response marketing, and cross-media projects for home entertainment and educational applications.

As a record company executive, Quincy remained highly active in the recording field throughout the 1990s as the guiding force behind his own Qwest Records, which boasted such important artists as New Order, Tevin Campbell, Andre Crouch, Patti Austin, James Ingram, Siedah Garrett, Gregory Jefferson and Justin Warfield. New Order's album, Substance earned Qwest a gold album in 1987. Tevin Campbell's T.E.V.I.N was both a critical sensation and major commercial success, and the label's release of the Boyz N The Hood soundtrack album was among the most successful soundtrack recordings of 1991. Qwest Records has also released soundtrack albums from the major motion pictures Sarafina! and Malcolm X.

In 1994, Quincy Jones led a group of businessmen, including Hall of Fame football player Willie Davis, television producer Don Cornelius, television journalist Geraldo Rivera and businesswoman Sonia Gonsalves Salzman in the formation of Qwest Broadcasting, a minority controlled broadcasting company which purchased television stations in Atlanta and New Orleans for approximately $167 million, establishing it as one of the largest minority owned broadcasting companies in the United States. Quincy served as chairman and CEO of Qwest Broadcasting. In 1999, taking advantage of the rapid escalation of broadcast station values, Jones and his partners sold Qwest Broadcasting for a reported $270 million.

The laurels, awards and accolades have been innumerable: Quincy has won an Emmy Award for his score of the of the opening episode of the landmark TV miniseries, Roots, seven Oscar nominations, the Academy of Motion Picture Arts and Sciences' Jean Hersholt Humanitarian Award, 27 Grammy Awards, and N.A.R.A.S.' prestigious Trustees' Award and The Grammy Living Legend Award. He is the all-time most nominated Grammy artist with a total of 79 Grammy nominations. In 1990, France recognized Quincy with its most distinguished title, the Commandeur de la Legion d' Honneur. He is also the recipient of the French Ministry of Culture's Distinguished Arts and Letters Award. Quincy is the recipient of the Royal Swedish Academy of Music's coveted Polar Music Prize, and the Republic of Italy's Rudolph Valentino Award. He is also the recipient of honorary doctorates from Howard University, the Berklee College of Music, Seattle University, Wesleyan University, Brandeis University, Loyola University (New Orleans), Clark Atlanta University, Claremont University's Graduate School, the University of Connecticut, Harvard University, Tuskegee University, New York University, University of Miami and The American Film Institute, among others. In 2001, Jones was named a Kennedy Center Honoree, for his contributions to the cultural fabric of the United States of America. He was recognized by the National Endowment for the Arts as a Jazz Master—the nation's highest jazz honor, and was most recently bestowed the National Medal of Arts, our nation's highest artistic honor.

In 1990, his life and career were chronicled in the critically acclaimed Warner Bros. film, Listen Up: The Lives of Quincy Jones, produced by Courtney Sale Ross, a film which helped illuminate not only Quincy's life and spirit, but also revealed much about the development of the African American musical tradition. Reflecting on the changes in pop music over the years, Quincy says, "If there are any common denominators, they are spirit and

musicality. I go for the music that gives me goose bumps, music that touches my heart and my soul." Over the years, Quincy Jones has reached the essence of music and art: the ability to touch people's feelings and emotions.

In 2001, Quincy Jones added the title "Best Selling Author" to his list of accomplishments when his autobiography *Q: The Autobiography of Quincy Jones* entered the *New York Times*, *Los Angeles Times* and *Wall Street Journal* Best-Sellers lists. Released by Doubleday Publishing, the critically acclaimed biography retells Jones' life story from his days as an impoverished youth on the Southside of Chicago through a massively impressive career in music, film and television where he worked beside legends such as Billie Holiday, Ray Charles, Dizzy Gillespie, Count Basie, Ella Fitzgerald and Michael Jackson, among many others. In conjunction with the autobiography, Rhino Records released a 4-cd boxed set of Jones' music, spanning his more than 5 decade career in the music business, entitled "Q: The Musical Biography of Quincy Jones."

The audio recording of "Q: The Autobiography of Quincy Jones," (Simon & Schuster) earned Jones his 27th Grammy Award, in the Best Spoken Word Category, while "Q: The Musical Biography of Quincy Jones" garnered him a 15th NAACP Image Award, in the category of Outstanding Jazz Artist.

In 2008 *The Complete Quincy Jones: My Journey & Passions*, (Palace Press) examined the virtuosity of the man Frank Sinatra named "Q," celebrating his prolific contribution to American art and culture. The book included a foreword by Clint Eastwood, preface from Bono, an introduction by Maya Angelou and an afterword by Sidney Poitier. Comprised of personal interviews and recollections from Jones, this collection peers behind the veil of celebrity, with extraordinary access to his creative inspirations and achievements.

Jones next projects include the forthcoming release of Soul Bossa Nostra, an album featuring some of today's biggest recording artists and producers such as Usher, Ludacris, Akon, Jamie Foxx, Jennifer Hudson, Mary J. Blige, T-Pain, Robin Thicke, LL Cool J, John Legend, Snoop Dogg, Wyclef Jean, Q-Tip, Talib Kweli, Three 6 Mafia, David Banner, Bebe Winans, Mervyn Warren, Jermaine Dupri, DJ Paul, and Scott Storch, among others, who have joined together to celebrate the music of the multi-Grammy winning producer, composer and arranger by recording contemporary versions of popular recordings from his massive catalog; the book *Q on Producing* which recounts his six-decade long career working in the recording studio with music icons such as Count Basie, Duke Ellington, Ella Fitzgerald, Frank Sinatra and Michael Jackson, among many others; a duets album with Stevie Wonder and Tony Bennett; as well as multiple projects for film and television.

With a long history of humanitarian work which began in the 1960's and 70's, Jones was one of the key supporters of Jesse Jackson's Operation P.U.S.H. In 1985, he pioneered the model of using celebrity to raise money and awareness for a cause with "We Are the World." The song remains the best-selling single of all-time, and raised more than $63 Million for Ethiopian famine relief. More importantly, however, it shined a spotlight on the Ethiopian drought and U.S. Government responded with over $800 million in aid.

In 1999 Quincy Jones joined Bono and Bob Geldof during a meeting with Pope John Paul II as a part of the Jubilee 2000 delegation to end third world debt. The delegation's visit resulted in $27 billion in third world debt relief for Bolivia, Mozambique, and the Ivory Coast.

In 2004, in front of a live audience of more than a half-million spectators, Jones launched the *We Are the Future* initiative with a concert featuring Carlos Santana, Alicia Keyes, Josh Groban, Oprah Winfrey, Norah Jones and a host of other entertainers from around the world. The initiative has established Municipal Child Centers in the cities of Addis Ababa (Ethiopia), Asmara (Eritrea), Freetown (Sierra Leone), Kigali (Rwanda) and Nablus (Palestine) where youth are being trained to run child-based programs in health, nutrition, Information and Communication Technology (ICT), Sports and Arts.

In 2007, Jones and the Harvard School of Public Health joined forces to advance the health and well-being of children worldwide through Project Q, a strategic initiative of School's Center for Health Communication. Through the strategic use of media, Project Q challenges leaders and citizens of the world to provide essential resources to enable young people to achieve their full potential.

A centerpiece of Project Q is the Q Prize, which recognizes extraordinary leadership by public figures and social entrepreneurs who are championing the needs of children. The inaugural Q Prize was awarded in January 2007 to Scott Neeson, founder of the Cambodian Children's Fund, and over $600,000 was raised in support of Neeson's work. The 2008 Q Prize will be awarded on October 23 in New York City.

Through his personal foundation, The Quincy Jones Foundation, Jones raises awareness and financial resources for initiatives that support global children's issues in areas of conflict, malaria eradication, clean water and efforts to restore the Gulf Coast (post-Katrina). Philanthropic partners include Malaria No More, Millennium Promise, and R&B singer Usher's New Look Foundation.

MARY **JORDAN**

Mary Catherine Jordan (born November 10, 1960) is a Pulitzer Prize-winning American journalist for the *Washington Post*. She is currently the editor of Washington Post Live, which organizes political debates, conferences and news events for the media company. She has written on U.S. politics, the American education system and many other subjects. With her husband, *Post* journalist Kevin Sullivan, Jordan ran the newspaper's bureaus in Tokyo, Mexico City and London. Jordan has written from nearly 40 countries and also been a frequent commentator on BBC Television.

Jordan, a daughter of Irish immigrants, was born and raised in Cleveland, Ohio. She graduated from Georgetown University in 1983 and earned a master's degree from Columbia University's Graduate School of Journalism in 1984. In 1989–90, Jordan was awarded a Nieman Fellowship by Harvard University.

Jordan began her Post career as an intern for the Style section, crisscrossed the country writing about colleges and schools as the national education reporter, and covered Virginia and national politics.

For a year at Trinity College in Dublin, Ireland, she studied William Butler Yeats and other Irish poets. She was given her first job in the newspaper business by legendary Irish author and editor Tim Pat Coogan, who hired her to write a column in the *Irish Press*. She enrolled in Japanese language classes at Georgetown University before moving to Tokyo for four years and studied Spanish on a post-graduate fellowship at Stanford University before moving to Mexico for five years.

Currently, Jordan moderates many high-profile forums for the *Washington Post* including the "The 40th Anniversary of Watergate" in June 2012 that featured key Watergate figures including including former White House counsel John Dean, *Washington Post* editor Ben Bradlee, and reporters Bob Woodward and Carl Bernstein.

She hosted the 2010 Maryland gubernatorial debate between Governor Martin O'Malley and former Governor Robert Ehrlich, and moderated a rare sitdown with Redskin owner Dan Snyder, Capital's owner Ted Leonsis, and other owners of Washington's sports teams.

Among the many newsmakers she has interviewed: Legendary singer and songwriter Paul McCartney, Colombian novelist Gabriel Garcia Marquez, Nobel Prize winner Henry Kissinger, former British Prime Minister Tony Blair and Benjamin Arellano Felix, one of Mexico's most notorious drug kingpins. Jordan has written extensively about injustices and discrimination against women around the world including articles about the exceedingly low conviction rate of rape in Britain and the unfortunate girls in India denied schooling solely because they were not born male.

Jordan and Sullivan won the 2003 Pulitzer Prize for International Reporting for their *Post* series on the "horrific conditions in Mexico's criminal justice system and how they affect the daily lives of people," as the Pulitzer Board described. Along with four Post photographers, Jordan and Sullivan were also finalists for the 2009 Pulitzer Prize for International Reporting for their series of stories on the difficulties women face around the world. The Pulitzer jury called the series a "sensitive examination of how females in the developing world are often oppressed from birth to death, a reporting project marked by indelible portraits of women and girls and enhanced by multimedia presentations."

Jordan and Sullivan authored *The Prison Angel: Mother Antonia's Journey from Beverly Hills to a Life of Service in a Mexican Jail* (The Penguin Press, 2005). In 2006, the book won the Christopher Award, which "salutes media that affirm the highest values of the human spirit." Jordan and Sullivan have also won numerous other awards including the George Polk Award for their coverage of the 1997 Asian Financial Crisis and awards from the Overseas Press Club of America and the Society of Professional Journalists.

JON **KAMEN**

@radical.media creates some of the world's most innovative content across all platforms of media. Originally renowned for its commercial and advertising success, it has transformed and grown to develop, produce, and distribute television, feature films, music programming, live events, digital content and design. As the founding Chairman and CEO of @radical.media, Jon continues to expand @radical's capabilities within this ever-evolving media landscape.

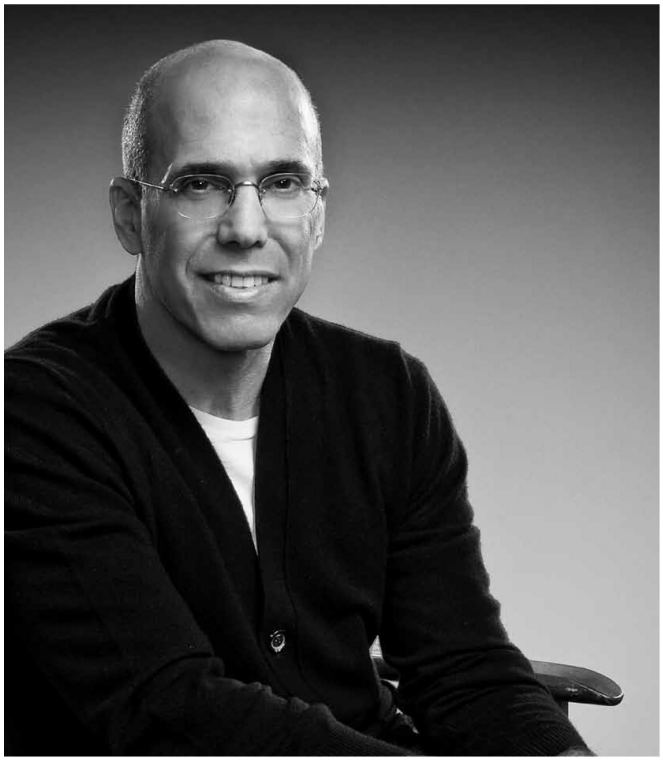
Beyond an Executive, Jon is a Producer and Executive Producer of groundbreaking projects. Amongst @radical's major achievements, @radical.media has been recognized for producing multiple award-winning projects including the Academy Award and Independent Spirit Award for the documentary The Fog of War; and a Grammy for the Concert for George. This past year, @radical produced the Academy Award and Emmy-nominated HBO documentary Paradise Lost 3 and the Emmy-nominated A&E documentary following Paul Simon's Graceland journey, Under African Skies.

@radical is currently in production on a Ron Howard-directed documentary on the Made In America festival in Philadelphia. And it recently launched THNKR, a Premium YouTube Channel, offering viewers extraordinary access to the people, stories, and ideas that are transforming the world.

Beyond his professional duties and prolific production credits, Jon is on the Board of Trustees of the Rhode Island School of Design, and has recently has been appointed to the Board of the Mr. Holland's Opus Foundation. Jon has continuously fostered @ radical's work with numerous organizations and public service initiatives, including RED, ONE, and Conservation International. In 2012, he accepted Mayor Bloomberg's Made in New York Award at Gracie Mansion.

Jon strives to increase the reach, impact, and legacies of the advertising and entertainment industries. During his two terms as National Chairman of the AICP, he founded the "Art and Technique of the American Television Commercial," which has been presented for the past 20 years at the Museum of Modern Art. In 1994, Jon received the Crystal Apple Award for his outstanding contributions to the city's production industry.

JEFFREY **KATZENBERG**



Jeffrey Katzenberg (born December 21, 1950) is an American film producer and CEO of DreamWorks Animation. He is perhaps most known for his period as chairman of The Walt Disney Studios when Disney produced some of its biggest hits, including The Little Mermaid, Beauty and the Beast, Aladdin and The Lion King. As a founder and CEO of DreamWorks Animation, he has overseen the production of such animated franchises as Shrek, Madagascar, Kung Fu Panda, Monsters vs. Aliens and How to Train Your Dragon.

Katzenberg was born in New York City, the son of Anne, an artist, and Walter, a stockbroker. He attended the Ethical Culture Fieldston School, graduating in 1969.

Katzenberg began his career as an assistant to producer David Picker, then in 1974 he became an assistant to Barry Diller, the Chairman of Paramount Pictures. Diller moved Katzenberg to the marketing department, followed by other assignments within the studio, until he was assigned to revive the Star Trek franchise, which resulted in the hit film, Star Trek: The Motion Picture (1979). He continued to work his way up and became President of Production under Paramount President Michael Eisner.

In 1984, Michael Eisner became Chief Executive Officer (CEO) at The Walt Disney Company. Eisner brought Katzenberg with him to take charge of Disney's motion picture division. Katzenberg was responsible for reviving the studio which, at the time, ranked last at the box office among the major studios. He focused the studio on the production of adult-oriented comedies under its Touchstone Pictures banner, including films such as Down and Out in Beverly Hills (1986), Three Men and a Baby (1987) and Good Morning, Vietnam (1987). By 1987, Disney had become the number-one studio at the box office. Katzenberg also oversaw Touchstone Television, which produced such hit TV series, The Golden Girls and Home Improvement.

Katzenberg was also charged with turning around Disney's ailing Feature Animation unit, creating some intrastudio controversy when he personally edited three minutes out of a completed Disney animated feature, The Black Cauldron (1985), shortly after joining the company. Under his management, the animation department eventually began creating some of Disney's most critically acclaimed and highest grossing animated features. These films include Who Framed Roger Rabbit (1988), The Little Mermaid (1989),The Rescuers Down Under (1990), Beauty and the Beast (1991, the first animated feature to be nominated for an Academy Award for Best Picture), Aladdin (1992), and The Lion King (1994). In addition, Katzenberg also sealed the deal that created the highly successful partnership between Pixar and Disney and the deal that brought Miramax Films into Disney.

When Eisner's second in command, Frank Wells, died in a helicopter crash in 1994, Eisner refused to promote Katzenberg to the vacated position of president. This led to a falling out between the two executives, and Katzenberg left the company in September 1994. He launched a lawsuit against Disney to recover money he felt he was owed and settled out of court for an estimated $250 million.

Later in 1994, Katzenberg co-founded DreamWorks SKG with Steven Spielberg and David Geffen, with Katzenberg taking primary responsibility for animation operations. He was also credited as executive producer on the DreamWorks animated films The Prince of Egypt (1998), The Road to El Dorado and Joseph: King of Dreams (both in 2000) and Shrek in 2001.

After DreamWorks Animation suffered a $125 million loss on the traditionally-animated Sinbad: Legend of the Seven Seas, the studio switched to all computer-generated animation. Since then, DreamWorks' animated films have been consistently successful.

In 2004, DreamWorks Animation (DWA) was spun off from DreamWorks as a separate company headed by Katzenberg in an IPO and has recorded mostly profitable quarters since then.

The live-action DreamWorks movie studio was sold to Viacom in December 2005. In 2008, the live-action DreamWorks studio again became an independent production company, releasing its films through Disney.

In 2006, Katzenberg made an appearance on the fifth season of The Apprentice. He awarded the task winners an opportunity to be character voices in Over the Hedge.

Katzenberg has been an industry leader in promoting digital 3D production of film, calling it "the greatest advance in the film industry since the arrival of color in the 1930s." When Katzenberg appeared on The Colbert Report on April 20, 2010, he confirmed that from now on "every single movie" that DreamWorks Animation produced would be in 3D and gave Stephen Colbert a pair of new 3D glasses.

Katzenberg married Marilyn Siegel, a kindergarten teacher, in 1975, and they have two children.

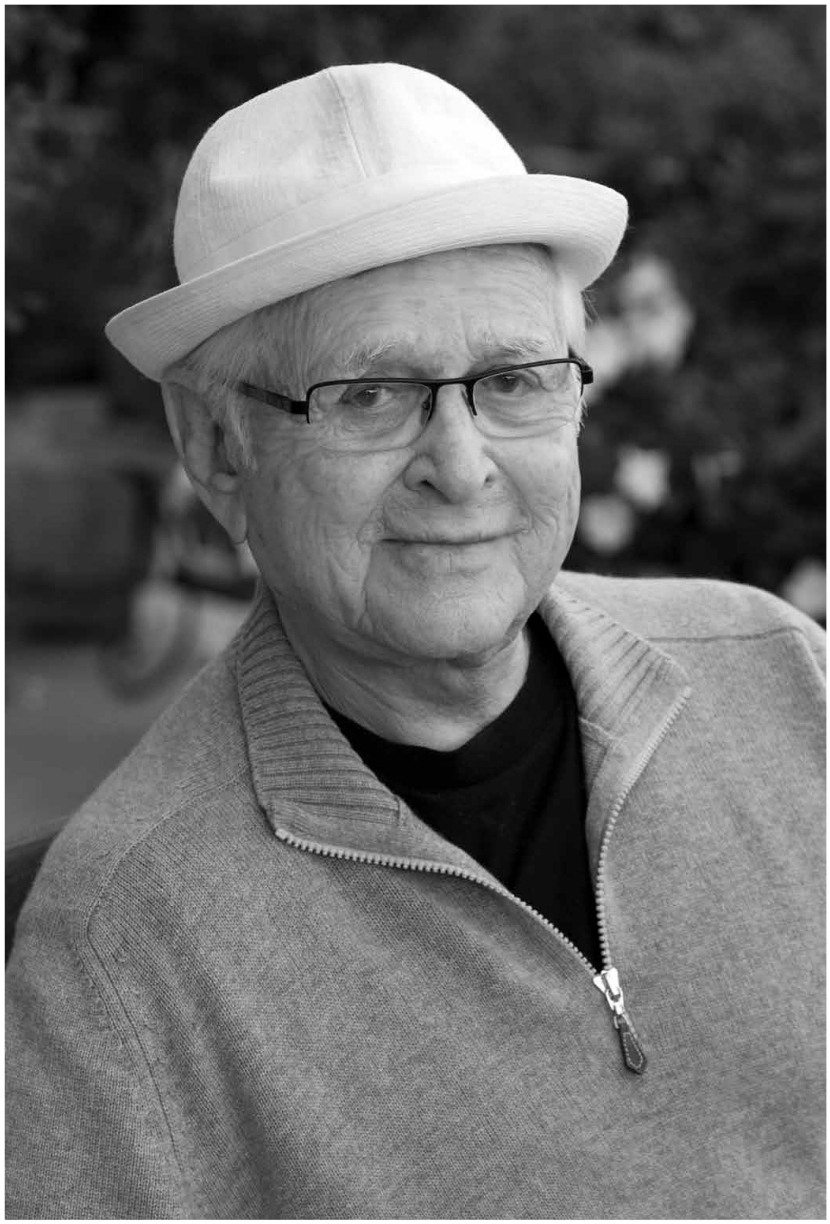
Together, Marilyn and Jeffrey have been highly active in charitable causes. They donated the multi-million-dollar Katzenberg Center to Boston University's College of General Studies, citing that the school gave their two children the "love of education." They also donated the Marilyn and Jeffrey Katzenberg Center for Animation at the University of Southern California.

In addition to serving as Chairman of the Board for the Motion Picture and Television Fund Foundation, Katzenberg sits on the boards or serves as a trustee of AIDS Project Los Angeles, American Museum of the Moving Image, California Institute of the Arts, Cedars-Sinai Medical Center, Geffen Playhouse, Michael J. Fox Foundation for Parkinson's Research, University of Southern California School of Cinematic Arts and The Simon Wiesenthal Center. Together with DreamWorks Animation, Katzenberg founded the DreamWorks Animation Academy of Inner-City Arts in 2008.

Katzenberg has an estimated worth of $800 million according to Forbes. Katzenberg is reported to have donated over $3.5 million in political contributions since 1979: 33% ($1.171+ million) to Democrats, 66% ($2.33+ million) to special interest groups without party affiliations, and less than 1% ($7,000) to Republicans.

He was awarded an honorary doctorate from Ringling College of Art and Design on May 2, 2008.

NORMAN **LEAR**



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Norman Lear has enjoyed a long career in television and film, and as a political and social activist and philanthropist.

Mr. Lear began his television writing career in 1950 when he and his partner, Ed Simmons, were signed to write for the The Ford Star Revue, starring Jack Haley. After only four shows, they were hired away by Jerry Lewis to write for the Martin and Lewis Colgate Comedy Hour, which they continued to write until 1953. Mr. Lear then began writing on his own for comedy shows including The Martha Raye Show, The George Gobel Show, and The Tennessee Ernie Ford Show.

In 1958, Mr. Lear teamed with director Bud Yorkin to form Tandem Productions. Together they produced several feature films, with Mr. Lear taking on roles as executive producer, writer, and director. He was nominated in 1967 for an Academy Award for his script for Divorce American Style. In 1970, CBS signed with Tandem to produce All in the Family, which first aired on January 12, 1971 and ran for nine seasons. It earned four Emmy Awards for Best Comedy series as well as the Peabody Award in 1977. All in the Family was followed by a succession of other television hit shows including Maude, Sanford and Son, The Jeffersons, One Day at a Time, Good Times, and Mary Hartman, Mary Hartman.

Concerned about the growing influence of radical religious evangelists, Mr. Lear decided to leave television in 1980 and formed People For the American Way, a non-profit organization designed to speak out for Bill of Rights guarantees and to monitor violations of constitutional freedoms. People For remains an influential and effective voice for freedom. In 1982, he produced a two-hour television special I Love Liberty, with a cast of stars and an audience filling the Los Angeles Sports Arena.

Mr. Lear's business career continued in 1984 when he and his business partners created T.A.T. Communications, later known as Embassy Communications, which was sold in 1985. Mr. Lear then created and is currently chairman of Act III Communications, a multimedia holding company with interests in the recording, motion picture, broadcasting, publishing, and licensing industries, including Concord Music Group and Village Roadshow Pictures Group.

In addition to People for the American Way, Mr. Lear has founded other nonprofit organizations, including the Norman Lear Center at the USC Annenberg School for Communication (2000–present), a multidisciplinary research and public policy center dedicated to exploring the convergence of entertainment, commerce and society; the Business Enterprise Trust (1989–2000) to spotlight exemplary social innovations in American business; and with his wife, Lyn, co-founded the Environmental Media Association (1989–present), to mobilize the entertainment industry to become more environmentally responsible.

In 1999, President Clinton bestowed the National Medal of Arts on Mr. Lear, noting that "Norman Lear has held up a mirror to American society and changed the way we look at it." He has the distinction of being among the first seven television pioneers inducted into the Television Academy Hall of Fame (1984). In addition to his awards for All in the Family, he has been honored by the International Platform Association (1977), the Writers Guild of America (1977) and many other professional and civic organizations.

In 2001, Lyn and Norman Lear created the Declaration of Independence Road Trip, a four-year educational initiative and national multimedia tour of one of the surviving original copies of the Declaration, which they purchased to share with the American people. As part of the project, Mr. Lear launched Declare Yourself, a nonpartisan youth voter initiative that registered well over four million new young voters in the 2004, 2006, and 2008 elections.

At the Presidential Inauguration in 2009, Declare Yourself premiered BornAgainAmerican.org, featuring an inspiring music video that has been viewed by millions across the country. It is part of an on-going drive to promote active and thoughtful citizenship, as embodied in the Declaration of Independence, which continues to tour.

Mr. Lear is married to Lyn Davis Lear and resides in Los Angeles, California. He has six children: Ellen, Kate, Maggie, Benjamin, Brianna, Madeline and four grandchildren: Daniel, Noah, Griffin, Zoe.

YO-YO **MA**

Yo-Yo Ma's multi-faceted career is testament to his continual search for new ways to communicate with audiences, and to his personal desire for artistic growth and renewal. Whether performing new or familiar works from the cello repertoire, coming together with colleagues for chamber music or exploring cultures and musical forms outside the Western classical tradition, Mr. Ma strives to find connections that stimulate the imagination.

One of Mr. Ma's goals is the exploration of music as a means of communication and as a vehicle for the migrations of ideas across a range of cultures throughout the world. Expanding upon this interest, in 1998, Mr. Ma established the Silk Road Project, a nonprofit arts and educational organization. Under his artistic direction, the Silk Road Project presents performances by the acclaimed Silk Road Ensemble, engages in cross-cultural exchanges and residencies, leads workshops for students, and partners with leading cultural institutions to create educational materials and programs.

The Project's ongoing affiliation with Harvard University has made it possible to broaden and enhance educational programming. In the 2011–2012 school year, with ongoing partnerships with arts and educational organizations in New York City, it continues to expand Silk Road Connect, a multidisciplinary educational initiative for middle-school students in the city's public schools. Developing new music is also a central undertaking of the Silk Road Project, which has been involved in commissioning and performing more than 60 new musical and multimedia works from composers and arrangers around the world.

As the Chicago Symphony Orchestra's Judson and Joyce Green Creative Consultant, Mr. Ma is partnering with Maestro Riccardo Muti to provide collaborative musical leadership and guidance on innovative program development for The Institute for Learning, Access and Training at the Chicago Symphony Orchestra, and for Chicago Symphony artistic initiatives. Mr. Ma's work focuses on the transformative power music can have in individuals' lives, and on increasing the number and variety of opportunities audiences have to experience music in their communities. Mr. Ma and the Institute have created the Citizen Musician Initiative, a movement that calls on all musicians, music lovers, music teachers and institutions to use the art form to bridge gulfs between people and to create and inspire a sense of community. www.citizenmusician.org features stories of Citizen Musician activity across the globe.

Mr. Ma is also widely recognized for his strong commitment to educational programs that bring the world into the classroom and the classroom into the world. While touring, he takes time whenever possible to conduct master classes as well as more informal programs for students—musicians and non-musicians alike. He has also reached young audiences through appearances on "Arthur," "Mister Rogers' Neighborhood" and "Sesame Street."

Mr. Ma's discography of over 75 albums (including more than 15 Grammy Award winners) reflects his wide-ranging interests. He has made several successful recordings that defy categorization, among them "Hush" with Bobby McFerrin, "Appalachia Waltz" and "Appalachian Journey" with Mark O'Connor and Edgar Meyer and two Grammy-winning tributes to the music of Brazil, "Obrigado Brazil" and "Obrigado Brazil—Live in Concert." Mr. Ma's recent recordings include Mendelssohn Trios with Emanuel Ax and Itzhak Perlman. His new album, "The Goat Rodeo Sessions," with Edgar Meyer, Chris Thile and Stuart Duncan was released in October 2011. Across this full range of releases, Mr. Ma remains one of the best-selling recording artists in the classical field. All of his recent albums have quickly entered the Billboard chart of classical best sellers, remaining in the Top 15 for extended periods, often with as many as four titles simultaneously on the list. In fall 2009, Sony Classical released a box set of over 90 albums to commemorate Mr. Ma's 30 years as a Sony recording artist.

Yo-Yo Ma was born in 1955 to Chinese parents living in Paris. He began to study the cello with his father at age four and soon came with his family to New York, where he spent most of his formative years. Later, his principal teacher was Leonard Rose at The Juilliard School. He has received numerous awards, including the Avery Fisher Prize (1978), the Glenn Gould Prize (1999), the National Medal of the Arts (2001), the Dan David Prize (2006), the Sonning Prize (2006), the World Economic Forum's Crystal Award (2008) and the Presidential Medal of Freedom (2010). In 2011 Mr. Ma was recognized as a Kennedy Center Honoree. He was the recipient of the 2012 Polar Music Prize. Appointed a CultureConnect Ambassador by the United States Department of State in 2002, Mr. Ma has met with, trained and mentored thousands of students worldwide in countries including Lithuania, Korea, Lebanon, Azerbaijan and China. Mr. Ma serves as a UN Messenger of Peace and as a member of the President's Committee on the Arts & the Humanities. He has performed for eight American presidents, most recently at the invitation of President Obama on the occasion of the 56th Inaugural Ceremony. Mr. Ma and his wife have two children. He plays two instruments, a 1733 Montagnana cello from Venice and the 1712 Davidoff Stradivarius.

For additional information, see: www.yo-yoma.com, www.silkroadproject.org, and www.opus3artists.com.

JOHN **MAEDA**

John Maeda (born 1966 in Seattle, Washington) is a Japanese-American graphic designer, computer scientist, academic, and author. His work in design, technology and leadership explores the area where the fields merge. He is the current President of the Rhode Island School of Design.

Maeda was originally a software engineering student at the Massachusetts Institute of Technology, when he became fascinated with the work of Paul Rand and Muriel Cooper. Cooper was a director of MIT's Visual Language Workshop. After completing his bachelors and masters degrees at MIT, Maeda studied in Japan at Tsukuba University's Institute of Art and Design to complete his Ph.D. in design.

As an artist, Maeda's early work redefined the use of electronic media as a tool for expression by combining computer programming with traditional artistic technique, laying the groundwork for the interactive motion graphics that are taken for granted on the web today. He has exhibited in one-man shows in London, New York and Paris. His work is in the permanent collections of the Museum of Modern Art, the San Francisco Museum of Modern Art and the Cartier Foundation in Paris.

At RISD, Maeda is leading the movement to transform STEM (Science, Technology, Engineering, and Math) to STEAM by adding Art. He believes art and design are poised to transform our economy in the 21st century like science and technology did in the last century.

In 1999, he was named one of the 21 most important people in the 21st century by *Esquire*. In 2001, he received the National Design Award for Communication Design in the United States and Japan's Mainichi Design Prize.

In 2006, Maeda published *Laws of Simplicity*, his best-selling book to date, based on a research project to find ways for people to simplify their life in the face of growing complexity.

In 2009 he was inducted into the New York Art Director's Club Hall of Fame, and he received the AIGA Medal in 2011. He is a trustee of the Cooper-Hewitt National Design Museum.

JOHN **MAZZIOTTA**

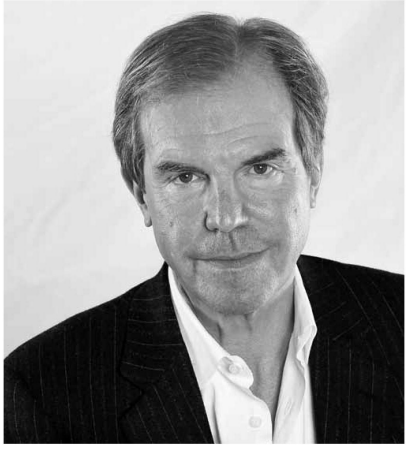
Dr. John Mazziotta is Chair of the Department of Neurology, David Geffen School of Medicine at UCLA, and Director of the UCLA Ahmanson-Lovelace Brain Mapping Center. After receiving his B.A. and M.A. degrees from Columbia University in 1972, he obtained an M.D. and Ph.D. in Neuroanatomy and Computer Science from Georgetown University in 1977. Following an internship at Georgetown, he completed Neurology and Nuclear Medicine training at UCLA and joined the faculty here in 1983.

Dr. Mazziotta chairs one of the nation's largest Neurology departments, which for nine of the last ten years achieved the distinguished position of being first in National Institutes of Health (NIH) research funding. An expert in brain imaging, he established the Brain Mapping Center at UCLA that includes all of the methods available to study human brain structure and function. He was the principal investigator of the International Consortium for Brain Mapping, whose goal is to develop the first atlas of the human brain that will include behavioral, demographic, imaging, and genetic data from 7,000 subjects.

Since beginning this work, Dr. Mazziotta has published more than 255 research papers and eight texts. He has received numerous awards and honors, including the Oldendorf Award from the American Society of Neuroimaging, the S. Weir Mitchell Award and the Wartenberg Prize of the American Academy of Neurology, the Von Hevesy Prize from the International Society of Nuclear Medicine, the 1996 Medical Science Award from the UCLA Medical Alumni Association, election to the Institute of Medicine of the National Academy of Sciences, Honorary Doctorate from l'Université de Caen and membership in the Royal College of Physicians.

In January 2012, Dr. Mazziotta was appointed Associate Vice Chancellor for Medical Sciences and Executive Vice Dean of the David Geffen School of Medicine at UCLA.

NICHOLAS **NEGROPONTE**



Nicholas Negroponte (born December 1, 1943) is an American architect best known as the founder and Chairman Emeritus of Massachusetts Institute of Technology's Media Lab, and also known as the founder of the One Laptop per Child Association (OLPC).

Negroponte was born to Dimitri John Negroponte, a Greek shipping magnate, and grew up in New York City's Upper East Side. He is the younger brother of John Negroponte, former United States Deputy Secretary of State.

He attended Buckley School in New York City, Le Rosey in Switzerland, and The Choate School (now Choate Rosemary Hall) in Wallingford, Connecticut, from which he graduated in 1961. Subsequently, he studied at MIT as both an undergraduate and graduate student in Architecture where his research focused on issues of computer-aided design. He earned a Master's degree in architecture from MIT in 1966.

Negroponte joined the faculty of MIT in 1966. For several years thereafter he divided his teaching time between MIT and several visiting professorships at Yale, Michigan and the University of California, Berkeley.

In 1967, Negroponte founded MIT's Architecture Machine Group, a combination lab and think tank which studied new approaches to human-computer interaction. In 1985, Negroponte created the MIT Media Lab with Jerome B. Wiesner. As director, he developed the lab into the pre-eminent computer science laboratory for new media and a high-tech playground for investigating the human-computer interface. Negroponte also became a proponent of intelligent agents and personalized electronic newspapers, for which he popularized the term the Daily Me.

In 1992, Negroponte became involved in the creation of *Wired* Magazine as the first investor. From 1993 to 1998, he contributed a monthly column to the magazine in which he reiterated a basic theme: "Move bits, not atoms."

Negroponte expanded many of the ideas from his Wired columns into a bestselling book *Being Digital* (1995), which made famous his forecasts on how the interactive world, the entertainment world and the information world would eventually merge. *Being Digital* was a bestseller and was translated into some twenty languages. Negroponte is a digital optimist who believed that computers would make life better for everyone. However, critics such as Cass Sunstein have faulted his techno-utopian ideas for failing to consider the historical, political and cultural realities with which new technologies should be viewed.

Negroponte's belief that wired technologies such as telephones will ultimately become unwired by using airwaves instead of wires or fiber optics, and that unwired technologies such as televisions will become wired, is commonly referred to as the Negroponte switch.

In 2000, Negroponte stepped down as director of the Media Lab as Walter Bender took over as Executive Director. However, Negroponte retained the role of laboratory Chairman. When Frank Moss was appointed director of the lab in 2006, Negroponte stepped down as lab chairman to focus more fully on his work with One Laptop Per Child (OLPC) although he retains his appointment as professor at MIT.

In November 2005, at the World Summit on the Information Society held in Tunis, Negroponte unveiled the concept of a $100 laptop computer, The Children's Machine, designed for students in the developing world. The price has increased to US$180, however. The project is part of a broader program by One Laptop Per Child, a non-profit organisation started by Negroponte and other Media Lab faculty, to extend Internet access in developing countries.

Negroponte is an active angel investor and has invested in over 30 startup companies over the last 30 years, including Zagats, *Wired*, Ambient Devices, Skype and Velti. He sits on several boards, including Motorola (listed on the New York Stock Exchange) and Velti (listed on the London Stock Exchange and the NASDAQ). He is also on the advisory board of TTI/Vanguard. In August 2007, he was appointed to a five-member special committee with the objective of assuring the continued journalistic and editorial integrity and independence of the *Wall Street Journal* and other Dow Jones & Company publications and services. The committee was formed as part of the merger of Dow Jones with News Corporation. Negroponte's fellow founding committee members are Louis Boccardi, Thomas Bray, Jack Fuller, and the late former Congresswoman Jennifer Dunn.

Negroponte has influenced modern day futurists, such as David Houle.

TODD **OLDHAM**

Todd is a well-known designer whose career spans more than 20 years. Distinguished as an innovator of accessible design, Todd Oldham is the founder of Todd Oldham Studio, a multifaceted, full-service design studio based in NYC.

Originally a New York fashion designer, the host of "Todd Time" on MTV's House of Style, Todd's career has evolved to include all areas of design, from interior design, film and photography, to furniture and graphic design.

Todd is currently working on his 19th book *Charley Harper's Animal Kingdom*. His previous books include a 672-page monograph on the life's work of artist Alexander Girard; a unique ongoing series called *Place Space* that explores singular places and the uncommonly devoted people that create them; an artist's monograph on the brilliant, warped work of Wayne White (all published by AMMO BOOKS). Most recently, Kid Made Modern, a collection of art supplies and kits, books and events, debuted this summer in all Target locations.

CRISTINA **PATO**

Cristina Pato has already opened historical new paths for the Gaita (Galician bagpipe). In 1998 Cristina Pato became the first female Gaita player releasing a solo album and since then she has collaborated with world music, jazz, classical and experimental artists (including Chicago Symphony, Yo-Yo Ma, The Chieftains, Arturo O'Farril, World Symphony Orchestra, Paquito D'Rivera). Her unique and powerful style full of passion and energy has been acclaimed by The *New York Times* as "a virtuosic burst of energy" or the BBC as "the Galician bagpipe diva". Cristina Pato fuses the influences of Latin music, jazz, pop and contemporary music, and uses her artistry and unprecedented virtuosic skill to bring her musical vision to life. Pato is a member of Yo-Yo Ma's Silk Road Ensemble.

Internationally acclaimed as a Gaita master and classical pianist, Cristina Pato enjoys an active professional career devoted to both Galician popular and classical music. Her dual careers have led to performances throughout major stages throughout the world, including USA (Carnegie Hall, Lincoln Center), India (Kamani Auditorium), Jerusalem (Jerusalem Festival), Angola, China, Corea, Portugal (Festa do Avante), Brazil (Liszt Festival), UK (Celtic Connections), France, Italy (Etnofestival), Germany, Mexico (Palacio de Bellas Artes) and her native Spain.

An active recording artist and performer since age 12, Ms. Pato has released four solo Gaita recordings, two as a pianist and has collaborated in more than thirty recordings as a guest artist, including the Grammy award winner "Yo-Yo Ma and Friends; Songs of Joy and Peace" (SONY BMG 2008), the "Miles Español: New Skectches of Spain" album and the Grammy nominated Silk Road Ensemble album "Off the Map"(World Village 2010). Ms. Pato has given more than 500 concerts with her own band many of them recorded and broadcasted by television stations such as BBC, TVG, CNN and RTVE, and she has been praised by newspapers as The *New York Times*, *El Pais*, *La Voz de Galicia* or The *Scotsman*.

Ms. Pato is Doctor of Musical Arts in Collaborative Piano from the Mason Gross School of the Arts, Rutgers University (NJ, USA), where she studied with a fellowship from Fundacion Barrie de la Maza. She was awarded with the Edna Mason Scholarship and the Irene Alm Memorial Prize for excellence in scholarly research and performance (Rutgers University, May 2008). Cristina Pato holds both a Master of Music Degree in Piano Performance and a Master of Music Degree in Music Theory and Chamber Music (with honors) from the Conservatorio de Musica del Liceu (Barcelona). She also holds also a Master of Fine Arts Degree in Digital Arts (Computer Music) from the Universitat Pompeu Fabra (Barcelona).

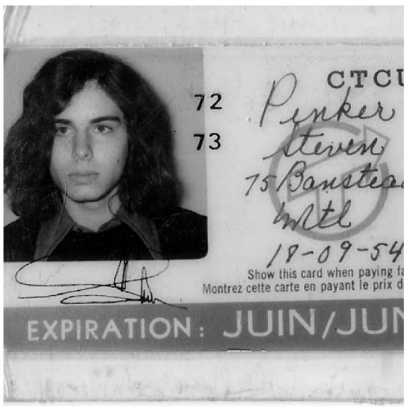
Cristina Pato is part of the Leadership Council of The SIlk Road Ensemble collaborating closely with Harvard University, the ensemble's residency. Cristina is also a faculty member (adjunct) at the vocal department of New Jersey City University.

During the 2011-2012 season Cristina Pato has toured Africa and Spain with her own band; USA, China, and Korea with Yo Yo Ma and The Silk Road Ensemble and India with HUM Ensemble. She collaborated in the album Miles Español along with Chick Corea and Jack DeJonnette and participated at the Kennedy Center Honors Awards honoring Yo Yo Ma with The Silk Road Ensemble, Johns Williams and James Taylor.

She is the founder and artistic director of Galician Connection, a forum in world music celebrated annually at Cidade da Cultura de Galicia.

Ms. Pato resides in New York City since 2004.
More info: www.cristinapato.com

STEVEN **PINKER**



Steven Pinker was born in 1954 in the English-speaking Jewish community of Montreal,Canada. He earned a bachelor's degree in experimental psychology at McGill University and then moved to Cambridge, Massachusetts in 1976, where he has spent most of his career bouncing back and forth between Harvard and MIT. He earned his doctorate at Harvard in 1979, followed by a postdoctoral fellowship at MIT, a one-year stint as an assistant professor at Harvard, and in 1982, a move back to MIT that lasted until 2003, when he returned to Harvard. Currently he is Harvard College Professor and the Johnstone Family Professor in the Department of Psychology. He also has spent two years in California: in 1981–82, when he was an assistant professor at Stanford, and in 1995–96,when he spent a sabbatical year at the University of California, Santa Barbara.

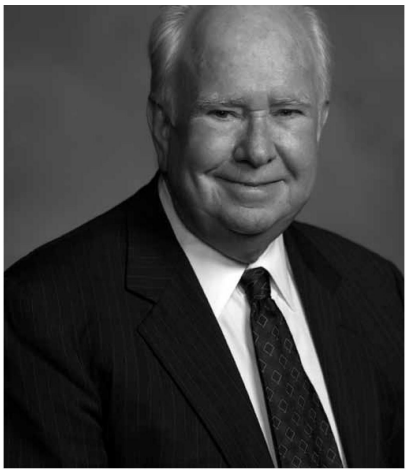
Pinker is an experimental psychologist who is interested in all aspects of language and mind. Much of his initial research was in visual cognition, the ability to imagine shapes, recognize faces and objects, and direct attention within the visual field. But beginning in graduate school he cultivated an interest in language, particularly language development in children, and this topic eventually took over his research activities. Aside from his experimental papers in language and visual cognition, he wrote two fairly technical books early in his career. One outlined a theory of how children acquire the words and grammatical structures of their mother tongue. The second focused on one aspect of this process, the ability to use different kinds of verbs in appropriate sentences, such as intransitive verbs, transitive verbs, and verbs taking different combinations of complements and indirect objects. For the next two decades his research focused on the distinction between irregular verbs like bring-brought and regular verbs like walk-walked. The reason is that the two kinds of verbs neatly embody the two processes that make language possible: looking up words in memory, and combining words (or parts of words) according to rules. He has also studied language development in twins and the neuroimaging of language processes in the brain, and has recently begun lines of research on the nature of reminding and on the function of innuendo and other forms of indirect speech.

In 1994 he published the first of five books written for a general audience. *The Language Instinct* was an introduction to all aspects of language, held together by the idea that language is a biological adaptation. This was followed in 1997 by *How the Mind Works*, which offered a similar synthesis of the rest of the mind, from vision and reasoning to the emotions, humor, and art. In 1999 he published *Words and Rules: The Ingredients of Language* which presented his research on regular and irregular verbs as a way of explaining how language works in general. In 2002 he published *The Blank Slate: The Modern Denial of Human Nature*, which explored the political, moral, and emotional colorings of the concept of human nature. *The Stuff of Thought: Language as a Window into Human Nature*, published in 2007, discussed the ways in which language reveals our thoughts, emotions, and social relationships. His most recent book is *The Better Angels of Our Nature: Why Violence Has Declined*, published in 2011. Pinker frequently writes for The *New York Times*, *Time*, The *New Republic*, and other magazines on subjects such as language and politics, the neural basis of consciousness, and the genetic enhancement of human beings.

Pinker is the Chair of the Usage Panel of The *American Heritage Dictionary* and has served as editor or advisor for numerous scientific, scholarly, media, and humanist organizations, including the American Association the Advancement of Science, the National Science Foundation, the American Academy of Arts and Sciences, the American Psychological Association, and the Linguistics Society of America. He has won many prizes for his books (including the William James Book Prize three times, the *Los Angeles Times* Science Book Prize, and the Eleanor Maccoby Book Prize), his research (including the Troland Research Prize from the National Academy of Sciences, the Early Career Award from the American Psychological Association, and the Henry Dale Prize from the Royal Institution of Great Britain), and his graduate and undergraduate teaching. He is also a Humanist Laureate, the 2006 Humanist of the Year, recipient of the 2008 Innovations for Humanity Award from La Ciudad de las Ideas in Mexico, the 2008 Honorary President of the Canadian Psychological Association, and the recipient of six honorary doctorates.

Pinker lives in Boston and in Truro with Rebecca Newberger Goldstein. The other authors in the family are his sister Susan Pinker and Rebecca's daughter Yael Goldstein Love.

LISA **RANDALL**



Professor Lisa Randall studies theoretical particle physics and cosmology at Harvard University. Her research connects theoretical insights to puzzles in our current understanding of the properties and interactions of matter. She has developed and studied a wide variety of models to address these questions, the most prominent involving extra dimensions of space. Her work has involved improving our under-standing of the Standard Model of particle physics, supersymmetry, baryogenesis, cosmological inflation, and dark matter. Randall's research also explores ways to experimentally test and verify ideas and her current research focuses in large part on the Large Hadron Collider and dark matter searches and models.

Randall has also had a public presence through her writing, lectures, and radio and TV appearances. Randall's books, *Warped Passages: Unraveling the Mysteries of the Universe's Hidden Dimensions* and *Knocking on Heaven's Door: How Physics and Scientific Thinking Illuminate the Universe and the Modern World* were both on The *New York Times*' list of 100 Notable Books of the Year. *Higgs Discovery: The Power of Empty Space* was released as a Kindle Single in the summer of 2012 as an update with recent particle physics developments.

Randall's studies have made her among the most cited and influential theoretical physicists and she has received numerous awards and honors for her scientific endeavors. She is a member of the National Academy of Sciences, the American Philosophical Society, the American Academy of Arts and Sciences, was a fellow of the American Physical Society, and is a past winner of an Alfred P. Sloan Foundation Research Fellowship, a National Science Foundation Young Investigator Award, a DOE Outstanding Junior Investigator Award, and the Westinghouse Science Talent Search. Randall is an Honorary Member of the Royal Irish Academy and an Honorary Fellow of the British Institute of Physics. In 2003, she received the Premio Caterina Tomassoni e Felice Pietro Chisesi Award, from the University of Rome, La Sapienza. In 2006, she received the Klopsteg Award from the American Society of Physics Teachers (AAPT) for her lectures and in 2007 she received the Julius Lilienfeld Prize from the American Physical Society for her work on elementary particle physics and cosmology and for communicating this work to the public.

Randall has also pursued art-science connections, writing a libretto for *Hypermusic: A Projective Opera in Seven Planes* that premiered in the Pompidou Center in Paris and co-curating an art exhibit for the Los Angeles Arts Association, Measure for Measure, which was presented in Gallery 825 in Los Angeles, at the Guggenheim Gallery at Chapman University, and at Harvard's Carpenter Center. In 2012, she was the recipient of the Andrew Gemant Award from the American Institute of Physics, which is given annually for significant contributions to the cultural, artistic, or humanistic dimension of physics.

Professor Randall was on the list of *Time* Magazine's "100 Most Influential People" of 2007 and was one of 40 people featured in The *Rolling Stone* 40th Anniversary issue that year. Prof. Randall was featured in *Newsweek's* "Who's Next in 2006" as "one of the most promising theoretical physicists of her generation" and in *Seed* Magazine's "2005 Year in Science Icons". In 2008, Prof. Randall was among *Esquire* Magazine's "75 Most Influential People."

Professor Randall earned her Ph.D. from Harvard University and held professorships at MIT and Princeton University before returning to Harvard in 2001. She is also the recipient of honorary degrees from Brown University, Duke University, Bard College, and the University of Antwerp.

PETER **RAVEN**

Peter H. Raven, a leading botanist and advocate of conservation and biodiversity with a notably international outlook, is president emeritus of the Missouri Botanical Garden and George Engelmann Professor of Botany Emeritus at Washington University in St. Louis. In addition, Dr. Raven is a Trustee of the National Geographic Society and Chairman of the Society's Committee for Research and Exploration. For more than 39 years, Dr. Raven headed the Missouri Botanical Garden, an institution he nurtured to become a world-class center for botanical research, education, and horticulture display. During this period, the Garden became a leader in botanical research and conservation in Latin America, Africa, Asia, and North America.

Dr. Raven first realized in the mid 1960s that the rapid growth of the human population, consumption, and the spread of polluting technologies were threatening biological diversity to a degree that had not been realized earlier. He soon became an outspoken advocate of the need for conservation throughout the world based on efforts to attain sustainability and social justice everywhere. He was described by *Time* magazine as a "Hero for the Planet," and has received numerous prizes and awards, including the International Prize for Biology from the government of Japan; Volvo Environment Prize; the Tyler Prize for Environmental Achievement; the Sasakawa Environment Prize; and the BBVA Prize for Ecology and Conservation, Madrid. In October 2009 he was awarded the first RBG Kew International Medal, given on the occasion of the 250th anniversary of the Gardens; in January 2010, the Award for International Scientific Cooperation of the Chinese Academy of Science and the Friendship Award (for promoting international cooperation) from the government of China. Earlier in 2012, he received an award from the President of Mexico for his work with Mexican scientists and institutions over the years. Earlier in his career, Dr. Raven held Guggenheim and John D. and Catherine T. MacArthur Foundation Fellowships.

In 2001, Dr. Raven received the National Medal of Science, the highest award for scientific accomplishment in the United States. He has been president of the American Association for the Advancement of Science, Sigma Xi, the American Institute of Biological Sciences, and a number of other organizations. He served for 12 years as Home Secretary of the National Academy of Sciences, to which he was elected in 1977. He is also a member of the American Academy of Arts and Sciences and of the American Philosophical Society, of the academies of science in Argentina, Australia, Austria, Brazil, Chile, China, Denmark, Georgia, Hungary, India, Italy, Mexico, New Zealand, Russia, Sweden, Ukraine, the U.K. (the Royal Society), and of the Pontifical Academy of Sciences and the Academy of Sciences for the Developing World (TWAS).

Dr. Raven is Co-editor of the *Flora of China*, a joint Chinese-American international project that is leading to a contemporary, 50-volume account on all the plants of China scheduled for completion at the end of 2012. He was the first chair of the U.S. Civilian Research and Development Foundation, a private, congressionally-chartered organization that funds joint research with the independent countries of the former Soviet Union.

Dr. Raven has written numerous books and publications, both popular and scientific, including *Biology of Plants* (co-authored with Ray Evert and Susan Eichhorn, W. H. Freeman and Company/Worth Publishers, New York), the internationally best-selling textbook in botany, of which the eighth edition appeared in 2011; and *Environment* (co-authored with Linda Berg, Wiley & Sons, New York), a leading textbook on the environment, now in its eighth edition (2011).

Dr. Raven received his Ph.D. from the University of California, Los Angeles, in 1960 after completing his undergraduate studies at the University of California, Berkeley. He has been awarded honorary degrees by a number of universities in the United States and around the world.

MOSHE **SAFDIE**

Moshe Safdie is an architect, urban planner, educator, theorist, and author. Embracing a comprehensive and humane design philosophy, Safdie is committed to architecture that supports and enhances a project's program; that is informed by the geographic, social, and cultural elements that define a place; and that responds to human needs and aspirations. Safdie has completed a wide range of projects, such as cultural, educational, and civic institutions; neighborhoods and public parks; mixed-use urban centers and airports; and master plans for existing communities and entirely new cities around the world.

Major projects by Safdie Architects currently under construction or recently completed include Mamilla Alrov Center, a dynamic urban center near the Old City in Jerusalem; Marina Bay Sands, a mixed-use integrated resort in Singapore; Khalsa Heritage Memorial Complex, the national museum of the Sikh people in the Punjab, India; the United States Institute of Peace Headquarters on the Mall in Washington, D.C.; the National Campus for the Archeology of Israel in Jerusalem; Golden Dream Bay, a high-density residential project in Qinhuangdao, China; the Kauffman Center for the Performing Arts in Kansas City, Missouri; and the Crystal Bridges Museum of American Art in Bentonville, Arkansas.

Born in Haifa, Israel, in 1938, Safdie moved to Canada with his family at a young age. He graduated from McGill University in 1961 with a degree in architecture. After apprenticing with Louis I. Kahn in Philadelphia, Safdie returned to Montreal to oversee the master plan for the 1967 World Exhibition. In 1964 he established his own firm to realize Habitat '67, an adaptation of his thesis at McGill, which was the central feature of the World's Fair and a groundbreaking design in the history of architecture.

In 1970, Safdie established a Jerusalem branch office, commencing an intense involvement with the rebuilding of Jerusalem. He was responsible for major segments of the restoration of the Old City and the reconstruction of the new center, linking the Old and New Cities. Over the years, his involvement expanded and included the new city of Modi'in, the new Yad Vashem Holocaust Museum, and the Rabin Memorial Center. During this period, Safdie also became involved in the developing world, working in Senegal, Iran, Singapore, and in the northern Canadian arctic. In 1978, after teaching at Yale, McGill, and Ben Gurion Universities, Safdie relocated his residence and principal office to Boston. He served as Director of the Urban Design Program at Harvard University Graduate School of Design from 1978 to 1984, and Ian Woodner Professor of Architecture and Urban Design from 1984 to 1989. In the following decade, he was responsible for the design of six of Canada's principal public institutions, including the Quebec Museum of Civilization, the National Gallery of Canada, and Vancouver Library Square.

Safdie has worked with a wide range of clients, including municipal entities and government agencies, colleges and universities, private developers, and non-profit organizations and civic institutions. Many of his firm's buildings have become beloved regional and national landmarks, including Exploration Place Science Center, Wichita, Kansas; Salt Lake City Public Library, Salt Lake City, Utah; Peabody Essex Museum, Salem, Massachusetts; Springfield Federal Courthouse, Springfield, Massachusetts; Skirball Cultural Center, Los Angeles, California; Lester B. Pearson International Airport, Toronto, Canada; the National Gallery of Canada; and Yad Vashem Holocaust Museum, Jerusalem, Israel.

In addition to numerous articles on the theory and practice of architecture, Safdie has written several books, most notably, *Beyond Habitat* (1970), *For Everyone a Garden* (1974), *Form and Purpose* (1982), and *Jerusalem: The Future of the Past* (1989). *The City After the Automobile* (1997) details Safdie's ideas about urbanism and city planning. A comprehensive monograph of his work, *Moshe Safdie I*, was published in 1996. *Moshe Safdie II*, a second monograph featuring work from 1996–2008, was published in 2009.

Safdie has been featured in several films, including Moshe Safdie, The Power of Architecture, which is a portrait film (directed by Donald Winkler, 2004), My Architect: A Son's Journey about Nathaniel Kahn and his father Louis I. Khan (directed by Nathaniel Kahn, 2003), and The Sound of the Carceri, about Bach and Piranesi, with Yo-Yo Ma (directed by Francois Girard, 1997). In the fall of 2010, The National Gallery of Canada presented *Global Citizen: The Architecture of Moshe Safdie*, an exhibition that explores the architect's buildings and design philosophy. The exhibition is co-sponsored by Crystal Bridges Museum of American Art and the Skirball Cultural Center.

Past exhibitions of Safdie's designs include *Building a New Museum* (Peabody Essex Museum, 2003-2004); *Moshe Safdie, Museum Architecture 1971–1998* (Tel Aviv University, 1998); *Moshe Safdie, Projects: 1979–1989* (Harvard University Graduate School of Design, 1989); and *For Everyone a Garden* (Baltimore Museum of Art, National Gallery of Canada, and San Francisco Museum of Modern Art, 1973-1974).

Safdie has been the recipient of numerous awards, honorary degrees, and civil honors, including the Companion of the Order of Canada and the Gold Medal of the Royal Architectural Institute of Canada.

MEGAN **SMITH**

Megan recently joined Google's advanced products team, Google [x], where she is working on range of projects including co-creating/hosting SolveForX, a forum to encourage and amplify technology-based moonshot thinking and teamwork (http://www.wesolveforx.com/). For nine years before that she oversaw Google's New Business Development team managing early-stage partnerships, pilot explorations, and technology licensing working closely with Google's engineering and product teams globally across all product areas. She led many of the company's early acquisitions, including Keyhole (Google Earth), Where2Tech (Google Maps) and Picasa. Megan also led the Google.org team transition to expand and innovate engineering based projects including Google Crisis Response, Google for Nonprofits, and Earth Outreach/Earth Engine, Googler 1%-time (now called "GoogleServe20") in addition to operationalizing Google's more traditional corporate giving.

Prior to joining Google in 2003, Megan was the CEO and, earlier, COO of PlanetOut, the leading gay, lesbian, bisexual and transgender online community, where the team broke through many barriers and partnered closely with all of the early major web players. She also held roles at General Magic and Apple Japan. Over the years, Megan has contributed to a wide range of engineering projects, including an award-winning bicycle lock, space station construction program, solar cookstoves and was a member of the MIT student team who designed, built and raced a solar car 2000 miles across the Australian outback. She holds a bachelor's degree and a master's degree in mechanical engineering from MIT, where she now serves on the board. She completed her master's thesis work at the MIT Media Lab.

BENEDIKT **TASCHEN**

Benedikt Taschen, 1961, Cologne, Germany, is a German publisher. His professional life started at age 18 in a 250-square-foot (23 m^2) store in Cologne, Germany, named TASCHEN COMICS. In 1984, he bought 40,000 remainder copies of a Magritte monograph published in English with money borrowed from his family. The books sold through at double the price in two months and he was soon publishing his own books. By the end of the 1980s TASCHEN titles were available in over a dozen languages at prices that made art books affordable to students and collectors alike.

By the late 1990s, he had become a household name in publishing. When *Vanity Fair's* Matt Tyrnauer deemed him, "one of the few people in business who has the courage to do exactly what he wants whenever he wants to", Benedikt Taschen tested the theory with Helmut Newton's *SUMO*, the largest bound book of the 20th century. "I have done a lot of books, and I can tell you—without mentioning names—that publishers are not all like him. There are very few like him. Or there are none like him. He is also, I might add, a madman", says Helmut Newton to *Vanity Fair*.

SUMO is also the company's most successful title of the last ten years and the precursor to Benedikt Taschen's most ambitious personal project: *GOAT—Greatest of All Time*, a tribute to Muhammad Ali, shipping in Spring 2004. Four years in the making, *GOAT* weighs 75 lbs and is 20″ x 20″ in size, with nearly 800 pages of archival and original photographs, graphic artwork and articles and essays—including those of Ali himself.

Another of his books is the *Icons* series of art books, some of the most accessible in the world.

Today, TASCHEN has offices in Cologne, Hong Kong, London, Los Angeles, Madrid, Paris and Tokyo and stores in Amsterdam, Berlin, Beverly Hills, Brussels, Cologne, Copenhagen, Hamburg, Hollywood, London, Miami, New York, and Paris. TASCHEN employs 200 staff members worldwide and many longtime freelance editors. As Billy Wilder put it in *Vanity Fair* 2000: "Benedikt reminds me of an old-time Hollywood figure—a studio head, someone who is in firm command and has his hand in everything".

He is married and lives in the *Chemosphere*, designed by John Lautner in 1960. He bought the home for $1 million in 1997, restored the building, and published a book on Lautner. He lives and works in Cologne and Los Angeles.

JULIE **TAYMOR**

In 1998, Julie Taymor became the first woman to win the Tony® Award for Best Direction of a Musical, and also won a Tony® for Best Costumes, for her landmark production of *The Lion King*. The musical has won three Molière Awards including Best Musical and Best Costumes, garnered Drama Desk, Outer Critics Circle and Drama League awards for Taymor's direction, and myriad awards for her original costume, mask and puppet designs. For her latest Broadway production, *Spider-Man: Turn Off the Dark*, Taymor served as director and co-book writer. Taymor made her Broadway debut in 1996 with *Juan Darién: A Carnival Mass*, nominated for five Tony® Awards.

Other theater work includes *The Green Bird*, *Titus Andronicus*, *The Tempest*, *The Taming of the Shrew*, *The Transposed Heads* and *Liberty's Taken*.

Taymor's feature film directorial debut, Titus, starred Anthony Hopkins, Jessica Lange and Alan Cumming. In 2002, her biographical film Frida, starring Salma Hayek and Alfred Molina, earned six Academy Award® nominations, winning two. She took on the music of the Beatles, and earned a Golden Globe® nomination for Best Motion Picture—Musical or Comedy, in Across the Universe. Julie's most recent film, The Tempest, had its North American premiere at the 48th New York Film Festival in October 2010, following a world premiere at the 67th Venice International Film Festival. Taymor's adaptation of the William Shakespeare play features an all-star cast including Helen Mirren, Russell Brand, Djimon Hounsou and Alfred Molina.

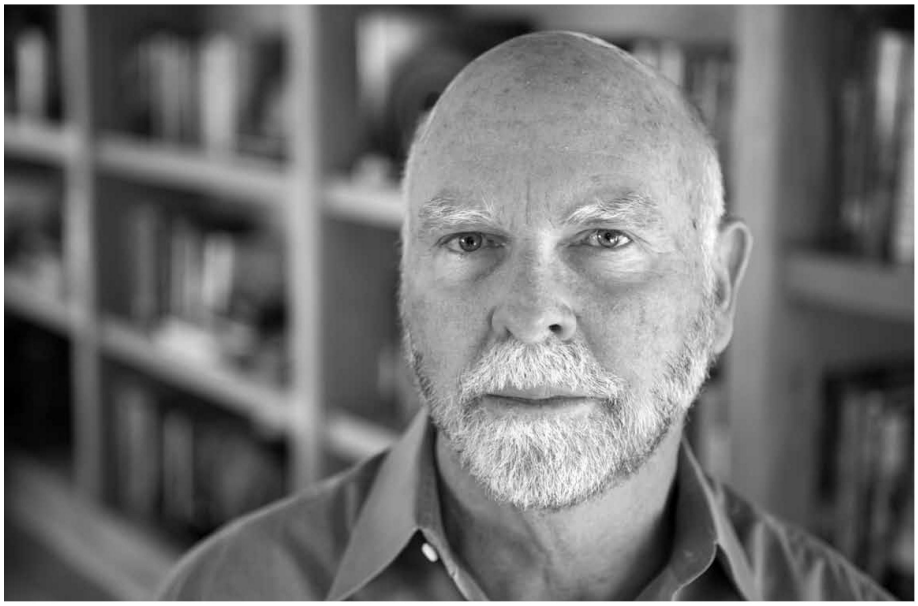
Beyond the theatre and screen, Taymor has directed five operas internationally including *Oedipus Rex* with Jessye Norman, for which she earned the International Classical Music Award for Best Opera Production. A subsequent film version premiered at the Sundance Film Festival and won her an Emmy® award.

Taymor also directed *Salomé*, *The Flying Dutchman*, *Die Zauberflöte* (which has been in repertory at The Met for six years), *The Magic Flute* (the abridged English version of *Die Zauberflöte*, which inaugurated a new PBS series entitled "Great Performances at The Met") and Elliot Goldenthal's *Grendel*.

An illustrated book on her career, Julie Taymor: *Playing With Fire*, was recently expanded and revised by Harry N. Abrams. Her book, *The Lion King: Pride Rock on Broadway*, is published by Hyperion. Taymor's adapted screenplay for Titus is published in an illustrated book by Newmarket Press. An illustrated book, *Frida: Bringing Frida Kahlo's Life and Art to Film*, is available from Newmarket Press. Harry N. Abrams also published an illustrated screenplay of Taymor's film adaptation of The Tempest which coincided with its premiere.

Taymor is a 1991 recipient of the MacArthur "genius" Fellowship.

J. CRAIG **VENTER**



J. Craig Venter, Ph.D., is regarded as one of the leading scientists of the 21st century for his numerous invaluable contributions to genomic research. He is Founder, Chairman, and President of the J. Craig Venter Institute (JCVI), a not-for-profit, research organization with approximately 300 scientists and staff dedicated to human, microbial, plant, synthetic and environmental genomic research, and the exploration of social and ethical issues in genomics.

Dr. Venter is also Founder and CEO of Synthetic Genomics Inc (SGI), a privately held company dedicated to commercializing genomic-driven solutions to address global needs such as new sources of energy, new food and nutritional products, and next generation vaccines.

Dr. Venter began his formal education after a tour of duty as a Navy Corpsman in Vietnam from 1967 to 1968. After earning both a Bachelor's degree in Biochemistry and a Ph.D. in Physiology and Pharmacology from the University of California at San Diego, he was appointed professor at the State University of New York at Buffalo and the Roswell Park Cancer Institute. In 1984, he moved to the National Institutes of Health campus where he developed Expressed Sequence Tags or ESTs, a revolutionary new strategy for rapid gene discovery. In 1992 Dr. Venter founded The Institute for Genomic Research (TIGR, now part of JCVI), a not-for-profit research institute, where in 1995 he and his team decoded the genome of the first free-living organism, the bacterium Haemophilus influenzae, using his new whole genome shotgun technique.

In 1998, Dr. Venter founded Celera Genomics to sequence the human genome using new tools and techniques he and his team developed. This research culminated with the February 2001 publication of the human genome in the journal, *Science*. He and his team at Celera also sequenced the fruit fly, mouse and rat genomes.

Dr. Venter and his team at JCVI continue to blaze new trails in genomics. They have sequenced and analyzed hundreds of genomes, and have published numerous important papers covering such areas as environmental genomics, the first complete diploid human genome, and the groundbreaking advance in creating the first self-replicating bacterial cell constructed entirely with synthetic DNA.

Dr. Venter is one of the most frequently cited scientists, and the author of more than 250 research articles. He is also the recipient of numerous honorary degrees, public honors, and scientific awards, including the 2008 United States National Medal of Science, the 2002 Gairdner Foundation International Award, the 2001 Paul Ehrlich and Ludwig Darmstaedter Prize and the King Faisal International Award for Science. Dr. Venter is a member of numerous prestigious scientific organizations including the National Academy of Sciences, the American Academy of Arts and Sciences, and the American Society for Microbiology.

CHARITY **TILLEMANN DICK**

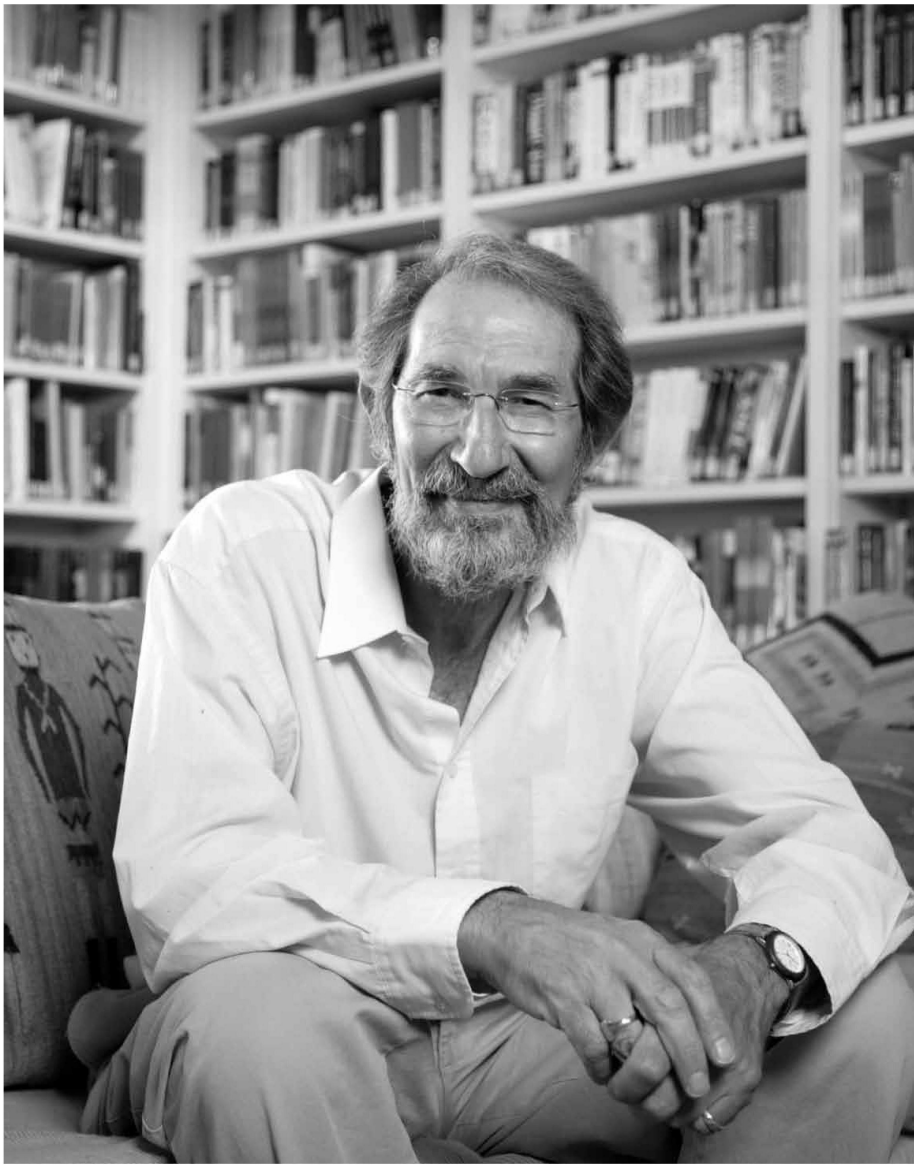
Charity Tillemann Dick is an American-born soprano and a recipient of two double lung transplants. Charity has performed across the United States, Europe, and Asia in venues as diverse as the Rose Theater at Lincoln Center in New York City; The Kennedy Center in Washington, DC; Severance Hall in Cleveland, Ohio; Il Giardino Di Boboli in Florence, Italy; the National Palace of the Arts in Budapest, Hungary; the Tel Aviv Opera House in Israel; the American Embassy in Beijing, China; the United Nations in New York; and National Statuary Hall in the United States Capitol. She has collaborated and performed with noted conductors and musicians including Eva Marton, Bruno Rigacci, Joela Jones, Marvin Hamlisch, Bono, Zoltan Kocis, Joan Dornemann, and former Secretary of State Dr. Condoleezza Rice. Some of her operatic roles have included Titania in A Mid Summer's Night Dream, Gilda in Rigoletto, Violetta in La Traviata, and Ophelia in Ophelia Forever. Charity has also performed for numerous presidents, prime ministers, members of Congress, and world dignitaries.

After receiving a diagnosis of Idiopathic Pulmonary Hypertension in 2004, Charity served as the national spokesperson for the Pulmonary Hypertension Association, working to raise awareness, increase federal research funding, expand stem cell research, and promote preventative and alternative medicine. In September of 2009, Charity received a bilateral lung transplant at the Cleveland Clinic in Ohio. After complications from rejection, Charity received a second bilateral lung transplant in January 2012.

Since receiving her first transplant, Charity has shared her amazing story and vocal talents at numerous conferences, musical performance, and events, including: TEDMED 2010 in San Diego, CA; the 6th National Learning Congress on Organ Donation in Dallas, TX; the 2010 Empathy and Innovation Summit in Cleveland, OH; and the EG Conference in Monterey, CA. Charity has been featured on CNN with Dr. Sanjay Gupta, CBS This Morning, Glamour magazine, ABCNews.com, TED.com, The Huffington Post, The *Wall Street Journal* Health Blog, the *Cleveland Plain Dealer*, the *San Francisco Chronicle*, and The *Sunday Times* (London). Her performances have been broadcast around the world on CNN, CBS, BBC, FOX, MSNBC, PBS, C-SPAN and NPR.

Charity received a Bachelor's degree with high honors from Regis University in Denver, CO, where she was raised with her 10 brothers and sisters. She later studied music at the Peabody Conservatory at Johns Hopkins University and the Liszt Academy of Music in Budapest. She currently resides in Washington, DC and New York City.

GEOFFREY **WEST**



Geoffrey West is Distinguished Professor and former President of the Santa Fe Institute (SFI) and an Associate Fellow of the Said Business School, Oxford University. Prior to joining SFI in 2003, he was leader of high energy physics at Los Alamos National Laboratory, where he remains a Senior Fellow. He received his B.A. from Cambridge University in 1961 and his Ph.D. in physics from Stanford University in 1966. After spells at Cornell and Harvard Universities, he returned to Stanford in 1970 to join the faculty. He was President of SFI from 2005–2009.

West is a theoretical physicist whose primary interests have been in fundamental questions in physics and biology, ranging from the elementary particles, their interactions and cosmological implications to the origins of universal scaling laws and a unifying quantitative framework of biology. His research in biology has included metabolic rate, growth, aging and mortality, sleep, cancer, and ecosystem dynamics.

His recent work has focused on developing an underlying quantitative theory for the structure and dynamics of cities, companies and long-term sustainability, including rates of growth and innovation, the accelerating pace of life, and why companies die, yet cities survive.

He has given many colloquia, keynote addresses and public lectures world-wide. Awards include the Mercer Prize from the Ecological Society of America, the Weldon Prize for Mathematical Biology, and the Glenn Award for Aging research. He has been featured in many publications world-wide including The *New York Times*, *Nature*, *Science*, The *Financial Times*, *Time*, *Newsweek* and *Scientific American* and has participated in television productions including Nova, National Geographic and the BBC. His work was selected as a breakthrough idea of 2007 by *Harvard Business Review* and, in 2006, he was named to *Time* magazine's list of "100 Most Influential People in the World".

will.i.am

will.i.am, a multi-faceted entertainer and creative innovator, is a seven-time Grammy Award winner. Known for his work with The Black Eyed Peas, who have sold 31 million albums and 58 million singles worldwide, he also works with some of the industry's biggest names including Michael Jackson, Rihanna, Usher, Nicki Minaj, Britney Spears, David Guetta, and film composer Hans Zimmer.

Frontman and founder of The Black Eyed Peas will.i.am has released two songs from his upcoming solo cd, #willpower on Interscope Records. The first two singles from the cd released in 2012 are: "T.H.E (The Hardest Ever)," featuring Mick Jagger and Jennifer Lopez, and number one hit song in the UK, "This is Love" featuring Eva Simons.

His songs and imagery have entertained and inspired millions, and the power of his words resonated deeply in his song "Yes We Can" that mobilized an entire generation to action during the 2008 presidential campaign. Demonstrating that music, brands and causes can be intertwined to entertain and inform, "Yes We Can" garnered an Emmy Award for "Best New Approaches in Daytime Entertainment."

In 2011, will.i.am executive produced and starred in his first prime time TV special "i.am FIRST: Science is Rock and Roll" to get young people excited about math and science education, as well as technology and science-related careers. Earlier this year he starred as a Coach on the hit reality TV show, "The Voice" UK edition on BBC One. While in London, will.i.am was a featured performer in "Concert for The Queen" in celebration of Queen Elizabeth II's Diamond Jubilee.

As a musician, producer, director and advocate for education, he is an enthusiastic user of technologies in both his professional and personal lives. In recognition of his ability to harness technology to enhance entertainment, creativity and communication, Intel Corporation appointed will as Director of Creative Innovation in 2011.

In collaboration with The Coca-Cola Company, will.i.am is on a mission to elevate the importance of recycling and to turn waste into a valued commodity through his EKOCYCLE brand. Launched in July, 2012, EKOCYCLE will give consumers more stylish options when shopping for fashion apparel, accessories and sporting goods that incorporate recycled plastic bottles and aluminum cans.

With a commitment to inspire kids to stay in school and go to college to become the leaders of tomorrow, will.i.am advocates regarding the importance and power of a good education through his i.am angel foundation's i.am scholarship. The i.am scholarship provides future leaders and innovators with comprehensive financial assistance to complete post-secondary education. The i.am angel foundation is also active in the U.K. through a STEM education and computer skills joint initiative with The Prince's Trust.

Recognized and honored by numerous industry organizations, will.i.am is the recipient of multiple Grammy Awards, a Latin Grammy Award, an Emmy Award, two NAACP Image Awards, a VH1 Do Something Award, the BMI President's Award and a 2008 Webby Award.

C. K. **WILLIAMS**

C. K. Williams (born Charles Kenneth Williams on November 2, 1936) is an American poet, critic and translator. Williams has won nearly every major poetry award. Flesh and Blood won the National Book Critics Circle Award in 1987. Repair (1999) won the 2000 Pulitzer Prize for Poetry, was a National Book Award finalist and won the Los Angeles Times Book Prize. The Singing won the National Book Award, 2003 and in 2005 Williams received the Ruth Lilly Poetry Prize.

C. K. Williams grew up in Newark, New Jersey and graduated from Columbia High School in Maplewood. He later briefly attended Bucknell University and graduated from the University of Pennsylvania. While at Penn he studied with the romantic scholar, Morse Peckham, and spent a great deal of time in the circle of young architects who studied with and worked for the great architect Louis Kahn. In an essay, "Beginnings," he acknowledges Kahn's dedication and patience as essential to his notion of the life of an artist.

Williams lived for a period in Philadelphia, where he worked for a number of years as a part-time psychotherapist for adolescents and young adults, a ghost-writer and editor, then began teaching, first at the YM-YWHA in Philadelphia, then at several universities in Pennsylvania, Beaver College, Drexel, and Franklin and Marshall. He subsequently taught at many other universities, including Columbia, NYU, Boston University, the University of California, both at Irvine and Berkeley, before finally becoming a professor at George Mason University, then moving in 1995 to Princeton University, where he has taught poetry workshops and translation ever since.

He met his present wife, Catherine Mauger, a French jeweler, in 1973, and they have a son who is now a noted painter, Jed Williams. He has a daughter from an earlier marriage, Jessie Burns, who is a writer. He lives half the year near Princeton, and the rest in Normandy in France.

He is a member of the American Academy of Arts and Letters.

His first book, *Lies*, was published in 1969, and since then he has published many collections of poetry, culminating in his *Collected Poems*, of which Peter Campion wrote in The *Boston Globe*: "Throughout the five decades represented in his new *Collected Poems*, Williams has maintained the most sincere, and largest, ambitions. Like Yeats and Lowell before him, he writes from the borderland between private and public life....[His poems] join skeptical intelligence and emotional sincerity, in a way that dignifies all of our attempts to make sense of the world and of ourselves. C. K. Williams has set a new standard for American poetry."

Another collection, *Wait*, appeared in 2010, and another, *Writers Writing Dying*, will come out in 2012.

He has written a memoir, *Misgivings*, which appeared in 2000, a collection of essays, *Poetry and Consciousness*, 1999, and a critical study of Walt Whitman, *On Whitman*, 2010. A new collection of essays, *In Time: Poets, Poems and the Rest*, will be published in 2012.

Williams is also an acclaimed translator, notably of Sophocles' *Women of Trachis* and Euripides' *The Bacchae*, as well as of the Polish poet Adam Zagajewski and the French poet Francis Ponge.

He has also published several children's books.

APES

One branch, I read, of a species of chimpanzees has something like territorial wars,
and when the…army, I suppose you'd call it, of one tribe prevails and captures an enemy,
"Several males hold a hand or foot of the rival so the victim can be damaged at will."

This is so disquieting: if beings with whom we share so many genes can be this cruel,
what hope for us? Still, "rival," "victim, "will"–don't such anthropomorphic terms
make those simians' social-political conflicts sound more brutal than they are?

The chimps Catherine and I saw on their island sanctuary in Uganda we loathed.
Unlike the pacific gorillas in the forest of Bwindi, they fought, dementedly shrieked,
the dominant male lorded it over the rest; they were, in all, too much like us.

Another island from my recent reading, where Columbus, on his last voyage,
encountering some "Indians" who'd greeted him with curiosity and warmth, wrote,
before he chained and enslaved them, "They don't even know how to kill each other."

It's occurred to me I've read enough–at my age all it does is confirm my sadness.
Surely the papers: war, terror, torture, corruption–they're like broken glass in the mind.
Back when I knew I knew nothing, I read all the time, poems, novels, philosophy, myth,

but I hardly glanced at the news, there was a distance between what could happen
and the part of myself I felt with: now everything's so tight against me I hardly can move.
The *Analects* say people in the golden age weren't aware they were governed; they just
lived.

Could I have passed through my own golden age and not even known I was there?
Some gold: nuclear rockets aimed at your head, racism, sexism, contempt for the poor.
And there I was, reading. What did I learn? Everything, nothing, too little, too much…
Just enough to get me here: a long-faced, white-haired ape with a book, still turning the
page.

C. K. **WILLIAMS**

EDWARD **WILSON**

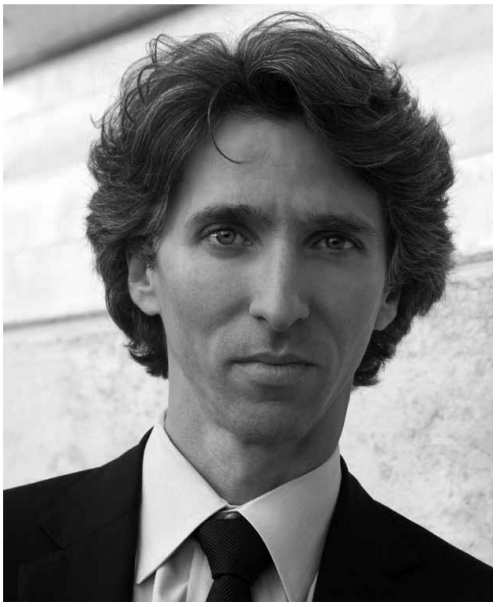
Edward Osborne Wilson is a world leading biologist and internationally recognized as one of the planet's most articulate authorities on the interrelatedness of knowledge disciplines and of life systems.

He is acknowledged for two interdisciplinary scientific disciplines (island biogeography and sociobiology), three unifying concepts for science and the humanities jointly (biophilia, biodiversity studies, and consilience), and one technological advance in the study of global biodiversity (the Encyclopedia of Life).

A native of Alabama, Wilson grew up in Mobile and received his bachelor's and master's degrees in biology from The University of Alabama (1949, 1950) and his doctoral degree in biology from Harvard University (1955).

Wilson has received more than 100 awards for his research on ants and biodiversity and for his writings addressed to both scientific and non-scientific audiences. He has received two Pulitzer Prizes in general non-fiction for his books *On Human Nature* (1979) and *The Ants* (1991); the Crafoord Prize from the Royal Swedish Academy of Sciences; the International Prize of Biology of Japan; and the Nonino and Serono Prizes for Letters and Sciences of Italy.

His work in the sciences, letters, the environment and conservation earned him prominence in the annals of the 21st Century. He was named one of the 25 most influential Americans by *Time* magazine and one of the world's 100 leading intellectuals by *Foreign Policy* magazine. He is the author of 28 books including the recent novel, *Anthill*, set in the woods of South Alabama; *The Social Conquest of Earth*; the soon-to-be-released profile of his boyhood hometown, *Why We Are Here: Mobile and the Spirit of a Southern City*.



DAMIAN **WOETZEL**

Damian Woetzel was a Principal Dancer at New York City Ballet and frequently performed internationally as a guest star and visiting artist with numerous companies including the Kirov Ballet and American Ballet Theatre, until his retirement from the stage in 2008. Woetzel currently serves as the Director of Arts Programs for the Aspen Institute, the Artistic Director of the Vail International Dance Festival, and as the Founding Director of the Jerome Robbins New Essential Works Program. Woetzel is also active as a director and producer outside these roles. Among his recent projects, Woetzel produced and directed an arts salute to Stephen Hawking at Lincoln Center for the World Science Festival, and directed the first performance of the White House Dance Series, which took place in the East Room of the White House and was hosted by First Lady Michelle Obama. Woetzel also works with Yo-Yo Ma on his Silk Road Connect program in the New York City Public Schools, and has twice directed culminating year-end performances; at the Museum of Natural History in 2010, and for the Central Park SummerStage series in 2011. Woetzel was appointed to the President's Committee on the Arts and Humanities by President Obama in 2009. In July 2012, Woetzel was honored with the inaugural Gene Kelly Legacy Award—an award jointly created by the Dizzy Feet Foundation and the Estate of Gene Kelly in honor of the 100th anniversary of Kelly's birth—for his contributions to the arts as a ballet star and director of dance and music performances.

In June 2011, Woetzel was named the Director of Arts Programs at the Aspen Institute. Under Woetzel's direction, the Aspen Institute Arts Program brings together leading artists, arts managers, sponsors, government officials

and patrons. Through these collaborations, the Program seeks to generate, exchange, and develop ideas and policies in order to encourage vibrancy and dynamism in all artistic realms, and to enrich civic culture in ways only the arts can.

Among the events curated by the Aspen Institute Arts Program under Woetzel's direction:

In November 2011, Woetzel curated the inaugural US-China Forum on the Arts and Culture in Beijing, in partnership with Asia Society and the Chinese People's Association for Friendship with Foreign Countries. The four day forum was the first in a series of cultural exchanges seeking to strengthen mutual understanding between Americans and Chinese through panel discussions, lectures, film screenings, museum tours, dinners and performance. American and Chinese artists and cultural representatives engaged in the forum included Joel Coen, Meryl Streep, Yo-Yo Ma, Alice Waters, Liu Ye, Ge You and others. Woetzel also directed a Public Forum in partnership with the Public Theater titled "Does Culture Make Us Who We are," hosted by Anne Hathaway with guests including Bill Irwin, David Brooks and Oskar Eustis.

In March 2012, Woetzel produced a panel with Howard Gardner, the Hobbs Professor of Cognition and Education at the Harvard Graduate School of Education, and Dr. Ellen Winner, Professor of Psychology at Boston College, and Senior Research Associate at Project Zero, examining the current state of the arts in education. Woetzel also hosted renowned artists Eric Fischl and Chuck Close in a conversation about artists and their audience at the Mary Boone Gallery in New York.

In June 2012, the Arts Program for the first time curated multiple sessions at the Institute's premiere public program, the Aspen Ideas Festival. For nineteen sessions, Woetzel brought renowned artists, policymakers, arts administrators as well as leading Chinese cultural representatives for discussions, film screenings and cultural exchanges focusing on how the arts impact society. Sessions included "Culture and Conflict" with Palestinian-born ballroom star and educator Pierre Dulaine and Dutch composer Merlijn Twaalfhoven; a conversation between renowned producer Julie Taymor and former Disney CEO and current Aspen Institute Arts Program chair Michael Eisner; "Radical Creative Spaces" with architect Elizabeth Diller; "Arts and the City: Making Cities Sing" with Rocco Landesman, Dennis Scholl, Darren Walker and Richard Florida; among many others.

Since 2006, Woetzel has been the Artistic Director of the summer Vail International Dance Festival, where he presents dance performances and commissions. He has instituted a number of initiatives as director, including bringing the educational arts program "Celebrate The Beat"—the Colorado associate of Jacques d'Amboise's National Dance Institute—to the Vail Valley, to reach local underserved children in the public schools.

Under Woetzel's direction, the festival has received wide acclaim for its innovation and growth as a nationally recognized showcase for dance, featuring such performances as the debut of Morphoses/The Wheeldon Company, and the launch of New York City Ballet MOVES. The annual International Evenings of Dance galas have become renowned for Woetzel's curation of first-time partnerships across companies and countries, as well as the presentation of young, emerging stars making their debuts in new repertory. In August 2012, The *New York Times*' Alastair Macaulay wrote that the 2012 Vail International Dance Festival presentations "were distinguished above all by catholic taste and brilliant programming. They merit superlatives" and that the International Evenings I gala "was simply the best gala I have attended in decades." Writing the same week, Wendy Perron of *Dance* Magazine compared Woetzel to the legendary impresario Serge Diaghilev, and praised Woetzel for engaging and educating audiences through spoken introductions to each work, and for his commitment to collaboration with live musicians.

Woetzel has also instituted a series of "UpClose" performances: lecture-demonstration events which combine rehearsal, performance and commentary by Woetzel and special guests. Recent UpClose performances have included: "UpClose: Stravinsky by Balanchine," an examination of the legendary collaboration between George Balanchine and Igor Stravinsky, co-hosted by Woetzel and New York City Ballet Master-in-Chief Peter Martins (2012); "UpClose: Premieres," which provided a first look at a series of works created in Vail by choreographers including Christopher Wheeldon and Emery LeCrone during the weeks of the 2011 Vail International Dance Festival; among many others.

In 2009 and 2010, Woetzel produced and directed the World Science Festival Gala Performances at Lincoln Center's Alice Tully Hall. For the 2010 event he created an arts salute to science honoring the theoretical physicist Stephen Hawking, featuring performances by Yo-Yo Ma, John Lithgow, and Kelli O'Hara among others.

In the fall of 2009, Woetzel helped create and began directing the Jerome Robbins Foundation's New Essential Works (NEW) Program, which supports choreographers and dance companies during the current financial crisis by giving grants to enable the production of new works.

In 2009, Woetzel launched as curator and director the new Studio 5 performance series at New York's City Center, which features in-depth examinations of today's most compelling dance artists and companies highlighted by in-studio performances and demonstrations. In 2009–2012, guests included David Hallberg, Christopher Wheeldon, Victoria Clark, Rob Berman, Angel Corella, Wendy Whelan, Edward Villella, among others; topics of discussion ranged from musical theatre to collaboration; and featured companies included American Ballet Theatre, the Paul Taylor Dance Company and Dance Theater of Harlem.

In June of 2010 Woetzel piloted "Arts Strike," a new effort to have celebrated artists engage educators and students, schools and communities, highlighting and sharing the unique power of the arts to empower, enrich and educate. The first events have taken place in Vail, Chicago, and Los Angeles, and have all featured Woetzel with Yo-Yo Ma in schools, engaging with students and their teachers to promote learning through the arts.

Woetzel works with Yo-Yo Ma on his Silk Road Connect program in the New York City Public Schools. In June 2010, Woetzel directed the culminating year-end event which took place at New York's Museum of Natural History, and featured the participation of the Silk Road Ensemble and 450 sixth-grade students. In June 2011, the culminating year-end event opened the Central Park SummerStage series. Titled "Night at the Caravanserai: Tales of Wonder," the performance again featured hundreds of sixth-grade students from New York-area public schools, Ma with his Silk Road Ensemble, vocalist Bobby McFerrin, the soprano Emalie Savoy, actor Bill Irwin, and author Jhumpa Lahiri, among others.

In April 2011, Woetzel organized an "arts strike" at Inner-City Arts in downtown Los Angeles with Yo-Yo Ma, The Silk Road Ensemble, and Memphis Jooker Charles "Lil Buck" Riley. The event included a demonstration and workshop for more than one hundred elementary school students from the Los Angeles Unified School District. Highlighting the event was a first-time duet directed by Woetzel between Ma and Lil Buck, who performed a Memphis Jookin' version of The Dying Swan with Ma accompanying on the cello; the performance was immortalized in a video shot by Spike Jonze which reached over one million views within weeks.

In the fall of 2010, Woetzel was a visiting Lecturer at Harvard Law School, where he co-taught a course on Performing Arts and the Law with Jeannie Suk.

Woetzel was the artistic director of the New York State Summer School for the Arts School of Ballet from 1994–2007.

Woetzel was a Principal Dancer at New York City Ballet from 1989 until his retirement from the stage in 2008. At New York City Ballet, Woetzel had works created for him by Jerome Robbins, Eliot Feld, Twyla Tharp, Susan Stroman, and Christopher Wheeldon among others, and danced more than 50 featured roles in the Company's repertory, including: George Balanchine's: Agon, Coppelia, Prodigal Son, Slaughter on Tenth Avenue, Stars and Stripes, Swan Lake; and Jerome Robbins': Afternoon of a Faun, Fancy Free, Dances at a Gathering, A Suite of Dances, and West Side Story Suite.

Woetzel originated featured roles in: Eliot Feld's *The Unanswered Question and Organon*, Peter Martins' *Jeu de Cartes* and *The Sleeping Beauty*, Jerome Robbins' *Ives*, *Songs* and *Quiet City*, Susan Stroman's "The Blue Necklace" from *Double Feature*, Twyla Tharp's *The Beethoven Seventh*, Christopher Wheeldon's *An American in Paris*, *Carousel (A Dance)*, *Evenfall*, *Morphoses*, and *Variations Sérieuses*. Woetzel also originated roles in ballets by Kevin O'Day, Richard Tanner, and Lynne Taylor-Corbett, among others.

Woetzel appeared in Dance in America's presentation of "Dinner with Balanchine," dancing Union Jack and Stars and Stripes. In October 1998, Mr. Woetzel appeared as one of the stars of the Cole Porter musical *Jubilee* in a special benefit performance at Carnegie Hall, during which he sang as well as danced. In May 1999, he starred as Prince Siegfried in Peter Martins' *Swan Lake* on the PBS national telecast "Live from Lincoln Center." Woetzel also appeared in the 2002 nationally televised Live from Lincoln Center broadcast "New York City Ballet's Diamond Project: Ten Years of New Choreography" on PBS and in the May 2004 Live from Lincoln Center broadcast of "Lincoln Center Celebrates Balanchine 100." Woetzel starred as the Cavalier in the film version of George Balanchine's *The Nutcracker™*, released in the winter of 1993.

During his career, Woetzel frequently performed internationally as a guest star and was a visiting artist with numerous companies including the Kirov Ballet and American Ballet Theatre. In his guest appearances, Woetzel danced principal roles in classics such as Don Quixote, Giselle, and La Bayadere, among others.

Woetzel has choreographed a number of ballets for New York City Ballet, among other companies. For New York City Ballet, he choreographed Ebony Concerto to Stravinsky, and Glazounov Pas de Deux to the composer's Les Ruses d'Amour. Woetzel also choreographed the "Polovtsian Dances" for New York City Opera's production of Prince Igor, and in 1998, he choreographed and starred in a new version of *An American in Paris* ballet for Marvin Hamlisch's Gershwin Centennial Gala.

Woetzel is the recipient of a Choo San Goh award for new choreography. He serves on the Artists Committee of the Kennedy Center Honors and as a judge for the Astaire Awards. He has also served as a juror for the Princess Grace Awards. Woetzel is a frequent speaker on the arts and arts policy. Woetzel was the 2008 Harman-Eisner Artist in Residence of the Aspen Institute, and in 2011, he became a member of the Knight Foundation's National Arts Advisory Committee. Woetzel also serves on the boards of directors of New York City Center, The Clive Barnes Foundation and The Sphinx Organization, and served on the recent Harvard Task Force on the Arts. In November 2009, President Obama appointed Woetzel to the President's Committee on the Arts and Humanities. In July 2012, Woetzel was honored with the inaugural Gene Kelly Legacy Award—an award jointly created by the Dizzy Feet Foundation and the Estate of Gene Kelly in honor of the 100th anniversary of Kelly's birth—for his contributions to the arts as a ballet star and director of dance and music performances.

Woetzel holds a Master in Public Administration Degree from Harvard's Kennedy School of Government.

Woetzel has been married to Heather Watts since 1999.

STEPHEN **WOLFRAM**

Stephen Wolfram has been responsible for three revolutionary developments: the *Mathematica* computation system, *A New Kind of Science*, and the Wolfram|Alpha computational knowledge engine.

Wolfram was educated at Eton, Oxford and Caltech, receiving his Ph.D. in theoretical physics at the age of 20. Wolfram's work on basic science led him to a series of fundamental discoveries about the computational universe of possible programs. Summarized in his best-selling 2002 book *A New Kind of Science*, these discoveries have not only launched major new directions in basic research, but have also led to breakthroughs in scientific modeling in physical, biological and social domains—as well as defining a broad new basis for technology discovery.

Launched in 1988, *Mathematica* has revolutionized the way technical computation is done, and has been responsible for countless advances over the past two decades. Starting from a set of fundamental principles devised by Wolfram, *Mathematica* has continually grown, integrating more and more algorithmic domains, and spawning such technologies as the Computable Document Format (CDF).

Building on *Mathematica* and *A New Kind of Science*, Wolfram in 2009 launched Wolfram|Alpha—an ambitious, long-term project to make as much of the world's knowledge as possible computable, and accessible to everyone. Used every day on the web and through apps by millions of people around the world, Wolfram|Alpha defines a fundamentally new kind of computing platform that is turning science-fiction computer intelligence into reality.

In addition to his scientific and technical achievements, Wolfram has been the CEO of Wolfram Research since its founding in 1987. Under Wolfram's leadership, Wolfram Research has become one of the world's most respected software companies, as well as a powerhouse of technical and intellectual innovation, and a major contributor to education and research around the world.

WILL **WRIGHT**

William Ralph "Will" Wright (born January 20, 1960, in Atlanta, Georgia) is an American video game designer and co-founder of the game development company Maxis, now part of Electronic Arts. In April 2009, he left Electronic Arts to run "Stupid Fun Club", an entertainment think tank in which Wright and EA are principal shareholders.

The first computer game Wright designed was Raid on Bungeling Bay in 1984, but it was SimCity that brought him to prominence. The game was released by Maxis, a company Wright formed with Jeff Braun, and he built upon the game's theme of computer simulation with numerous other titles including SimEarth and SimAnt.

Wright's greatest success to date came as the original designer for The Sims games series. The game spawned multiple sequels and expansions and Wright earned many awards for his work. His latest work, Spore, was released in September 2008 and features gameplay based upon the model of evolution and scientific advancement. The game sold 406,000 copies within three weeks of its release.

He was born as William Ralph Wright on January 20, 1960, in Atlanta. He is of French, English, Italian, and Native American descent.

After graduating at 16 from Episcopal High School, he enrolled in Louisiana State University, transferring two years later to Louisiana Tech. Beginning with a start at an architecture degree, followed by mechanical engineering, he fell into computers and robotics. He excelled in subjects he was interested in—architecture, economics, mechanical engineering, and military history—but was held back by his impractical goals such as language arts. His earlier dream of space colonization remained, and was joined by a love for robotics. After another two years at Louisiana Tech, in the fall of 1980, Wright moved on to The New School in Manhattan. He lived in an apartment over Balducci's, in Greenwich Village, and spent his spare time searching for spare parts in local electronics surplus stores. After one year at the New School, Wright returned to Baton Rouge without his degree, concluding five years of collegiate study.

During a summer break from college, he met his first wife Joell Jones, an artist currently living in California, on vacation to her hometown of Baton Rouge. In an interview published in February 2003, Will claims that games were absorbing so much of his time, he decided that perhaps making games was the way to go. Wright's first game was the helicopter action game Raid on Bungeling Bay (1984) for the Commodore 64.

Wright found that he had more fun creating levels with his level editor for Raid on Bungeling Bay than he had while actually playing the game. He created a new game that would later evolve into SimCity, but he had trouble finding a publisher. The structuralist dynamics of the game were in part inspired by the work of two architectural and urban theorists, Christopher Alexander and Jay Forrester.

"I'm interested in the process and strategies for design. The architect Christopher Alexander, in his book *A Pattern Language* formalized a lot of spatial relationships into a grammar for design. I'd really like to work toward a grammar for complex systems and present someone with tools for designing complex things."

Wright, in an interview with The *Times*, expressed belief that computers extend the imagination, and posits the emergence of the "metabrain", stating:

"Any human institutional system that draws on the intelligence of all its members is a metabrain. Up to now, we have had high friction between the neurons of the metabrain; technology is lowering that friction tremendously. Computers are allowing us to aggregate our intelligence in ways that were never possible before. If you look at Spore, people are making this stuff, and computers collect it, then decide who to send it to. The computer is the broker. What they are really exploring is the collective creativity of millions of people. They are aggregating human intelligence into a system that is more powerful than we thought artificial intelligence was going to be."

In 1986, he met Jeff Braun, an investor interested in entering the computer game industry, at what Wright calls "the world's most important pizza party." Together they formed Maxis the next year in Orinda, California. SimCity (1989) was a hit and has been credited as one of the most influential computer games ever made. Wright himself has been widely featured in several computer magazines—particularly *PC Gamer*, which has listed Wright in its annual 'Game Gods' feature, alongside such notables as Roberta Williams and Peter Molyneux.

Following the success of SimCity, Wright designed SimEarth (1990) and SimAnt (1991). He co-designed SimCity 2000 (1993) with Fred Haslam and in the meantime Maxis produced other "Sim" games. Wright's next game was SimCopter (1996). Although none of these games were as successful as SimCity, they further cemented Wright's reputation as a designer of "software toys"—games that cannot be won or lost. In 1992, Wright and his family moved to Orinda, California.

Wright has a great interest in complex adaptive systems and most of his games have been based around them or books that describe them (SimAnt: E.O. Wilson's *The Ants*, SimEarth: James Lovelock's *Gaia Theory*, SimCity: Jay Forrester's *Urban Dynamics and World Dynamics*, Spore: Drake's Equation and *The Powers of Ten*) Wright's role in the development of the concepts from simulations to games is to empower the players by creating what he dubs "possibility spaces", or simple rules and game elements that add up to a very complex design. All Maxis, and later games that Wright had a hand in designing, adhere to these design principles.

Maxis went public in 1995 with revenue of US$38 million. The stock reached $50 a share and then dropped as Maxis posted a loss. Electronic Arts bought Maxis in June 1997. Wright had been thinking about making a virtual doll house ever since the early 1990s, similar to SimCity but focused on individual people. Originally conceived of as an architectural design game called Home Tactics, Wright's idea changed when someone suggested the player should be rated on the quality of life experience by the homeowners. It was a difficult idea to sell to E.A., because already 40% of Maxis's employees had been laid off.

When Wright took his idea to the Maxis board of directors, Jeff Braun says, "The board looked at The Sims and said, 'What is this? He wants to do an interactive doll house? The guy is out of his mind.' " Doll houses were for girls, and girls didn't play video games. Maxis gave little support or financing for the game. Electronic Arts, which bought Maxis in 1997, was more enthusiastic. Wright's games are so different from E.A.'s other releases that it was hard to imagine the two being united in the same enterprise. But the success of SimCity had already established Sim as a strong brand, and E.A., which by then, fifteen years after its founding, was becoming a Procter & Gamble-style brand-management company, foresaw the possibility of building a Sim franchise.

E.A. published The Sims in February 2000 and it became Wright's biggest success yet. It eventually surpassed Myst as the best-selling computer game of all time and spawned numerous expansion packs and other games. He designed a massively multiplayer version of the game called The Sims Online, which was not as popular as the original. By November 2006, The Sims franchise had earned E.A. more than a billion dollars.

In a presentation at the Game Developers Conference on March 11, 2005, he announced his latest game Spore. He used the current work on this game to demonstrate methods that can be used to reduce the amount of content that needs to be created by the game developers. Wright hopes to inspire others to take risks in game creation.

As for his theories on interactive design, Wright says the following:

"Well, one thing I've always really enjoyed is making things. Out of whatever. It started with modeling as a kid, building models. When computers came along, I started learning programming and realizing the computer was this great tool for making things, making models, dynamic models, and behaviors, not just static models. I think when I started doing games I really wanted to carry that to the next step, to the player, so that you give the player a tool so that they can create things. And then you give them some context for that creation. You know, what is it, what kind of kind of world does it live in, what's its purpose? What are you trying to do with this thing that you're creating? To really put the player in the design role. And the actual world is reactive to their design. So they design something that the little world inside the computer reacts to. And then they have to revisit the design and redesign it, or tear it down and build another one, whatever it is. So I guess what really draws me to interactive entertainment and the thing that I try to keep focused on is enabling the creativity of the player. Giving them a pretty large solution space to solve the problem within the game. So the game represents this problem landscape. Most games have small solution landscapes, so there's one possible solution and one way to solve it. Other games, the games that tend to be more creative, have a much larger solution space, so you can potentially solve this problem in a way that nobody else has. If you're building a solution, how large that solution space is gives the player a much stronger feeling of empathy. If they know that what they've done is unique to them, they tend to care for it a lot more. I think that's the direction I tend to come from."

Wright believes that simulations as games can be used to improve education by teaching children how to learn. In his own words:

"The problem with our education system is we've taken this kind of narrow, reductionist, Aristotelian approach to what learning is. It's not designed for experimenting with complex systems and navigating your way through them in an intuitive way, which is what games teach. It's not really designed for failure, which is also something games teach. I mean, I think that failure is a better teacher than success. Trial and error, reverse-engineering stuff in your mind—all the ways that kids interact with games—that's the kind of thinking schools should be teaching. And I would argue that as the world becomes more complex, and as outcomes become less about success or failure, games are better at preparing you. The education system is going to realize this sooner or later. It's starting. Teachers are entering the system who grew up playing games. They're going to want to engage with the kids using games."

Wright will appear as a character in the video game Mr. T, where he will team up with Mr. T to fight Nazis.

Wright was given a "Lifetime Achievement Award" at the Game Developers Choice Awards in 2001. In 2002, he became the fifth person to be inducted into the Academy of Interactive Arts and Sciences' Hall of Fame. Until 2006, he was the only person to have been honored this way by both of these industry organizations. In 2007 the British Academy of Film and Television Arts awarded him a fellowship, the first given to a game designer.

He has been called one of the most important people in gaming, technology, and entertainment by publications such as *Entertainment Weekly*, *Time*, *PC Gamer*, *Discover* and *GameSpy*. Wright was also awarded the *PC Magazine* Lifetime Achievement Award in January 2005.

In 1980, along with co-driver and race organizer Rick Doherty, Wright participated in the U.S. Express, a cross-country race that was the predecessor to The Cannonball Run. Wright and Doherty drove a specially outfitted Mazda RX-7 from Brooklyn, New York to Santa Monica, California in 33:39, winning the illegal race. Wright only competed once in the race, which continued until 1983.

Since 2003, in his spare time, Wright has collected leftovers from the Soviet space program, "including a 100-pound hatch from a space shuttle, a seat from a Soyuz... control panels from the Mir", and the control console of the Soyuz 23, as well as dolls, dice, and fossils. During E3 2004 he passed off an old lapel pin commemorating the Soviet space program to a reporter.

"I'm uncollecting. I buy collections on eBay, and I disperse them out to people again. I have to be like an entropic force to collectors, otherwise all of this stuff will get sorted."

He once built competitive robots for BattleBots with his daughter, but no longer does so. As of November 2006, Wright still had remnant bits of machined metal left over from his BattleBots days strewn about the garage of his Oakland home. Wright was a former Robot Wars champion in the Berkeley-based robotics workshop, the Stupid Fun Club. One of Wright's bots, designed with the help of Wright's daughter Cassidy, "Kitty Puff Puff", fought against its opponents by sticking a roll of gauze onto its armature and circling around them, encapsulating them and denying them movement. The technique, *cocooning*, was eventually banned.

Following his work in BattleBots, he has taken steps into the field of human-robot interactions.

"We build these robots and we take them down to Berkeley and study the interactions that people have with the robots," says Wright. "We built this newer one that has a rapid-fire pingpong cannon. It will fire about 10 per second. So we give people this plastic bat and we say, 'It's set up to play baseball. Do you want to play baseball? It's going to shoot a little ball and you try to hit it.' And all of a sudden it's like da-da-da-da, and it's pelting them with balls."

After building his reputation as one of the most important game designers in the world, Wright in 2009 left Maxis, the Electronic Arts owned studio he founded. His first post-E.A. venture was the Stupid Fun Club.

In October 2010, Current TV announced that Will Wright will produce a new show for the network. The program, entitled Bar Karma, began airing in February 2011.

In October 2011, Will Wright became a member of the Board of Directors of Linden Lab, the creators of Second Life.

JOSHUA **WURMAN**

I grew up in Pennsylvania, bereft of any really meaningful opportunities to experience severe weather, hurricanes, even real deep snow. As a youth, I tried to impress friends and girls with my home weather station and insect collection. These efforts, among other factors, kept me well out of the running for homecoming king. Naturally, I moved on to a party school, the Massachusetts Institute of Technology (MIT) to search for a better social life. But hating schoolwork, I rushed through it, earning my MS at only 21. Then after some aimless additional years in school I dropped out for three years, working for the Air Force on nuclear winter computer simulations and other cheery subjects. Returning to MIT, I earned my Doctorate and moved to Colorado to work at the National Center for Atmospheric Research (NCAR) on bistatic radar networks, a new type of weather radar system that I had invented. However, after seeing real High Plains thunderstorms close up, and tornadoes, I got distracted and conceived of building a network of big, fast scanning radars that could drive right up to tornadoes and fires, inside hurricanes, and into other nice weather. The DOW program was born, and I moved down to Oklahoma to be a professor for a few years, chase tornadoes and hurricanes, file patents, teach and write papers. In the middle of this, I traveled to Asia on a research project and met my wife operating a weather radar on an island off the coast of Hong Kong and conned her into believing that Oklahoma was just like Hong Kong. After receiving tenure and the implied lifetime sentence at the university, I did the sensible thing: I quit and moved back to Boulder and founded my own non-profit research institution, the Center for Severe Weather Research (CSWR). My wife and I run CSWR, manage the DOWs as National Science Foundation (NSF) Facilities, and conduct research programs such as the VORTEX2 study and hurricane studies. We have four young children who, so far, show no unhealthy obsessive interests in tornadoes, hurricanes or radars. I've just finished the VORTEX2 tornado study (http://vortex2.org), which is the largest tornado research mission ever, funded mostly by NSF, employing about 120 scientists and crew in 50 vehicles. We had 11 radars, 4 balloon trucks, UAVs, 40 deployable instruments, 13 mobile mesonets, photogrammetry and microphysics teams, damage survey teams, basically more of anything that used to study tornadoes scientifically. Just imagine the lines for fuel and bathrooms in small-town gas stations. During WWW, I'll be keeping a nervous eye out for any hurricanes threatening to make landfall. If a hurricane looms, I'll be leading my team into the eye.

TELEPRESENCE CONVERSATIONS TENTATIVE

MAO **YUSHI**

Chinese economist, 2012 Milton Friedman Liberty Award.
(He wrote an online column criticizing the communist
and totalitarian policies of Mao Zedong (Chairman
Mao) in China, attacked by Maoists in China.)
http://www.cato.org/special/friedman/yushi/index.html

YAO **MING**

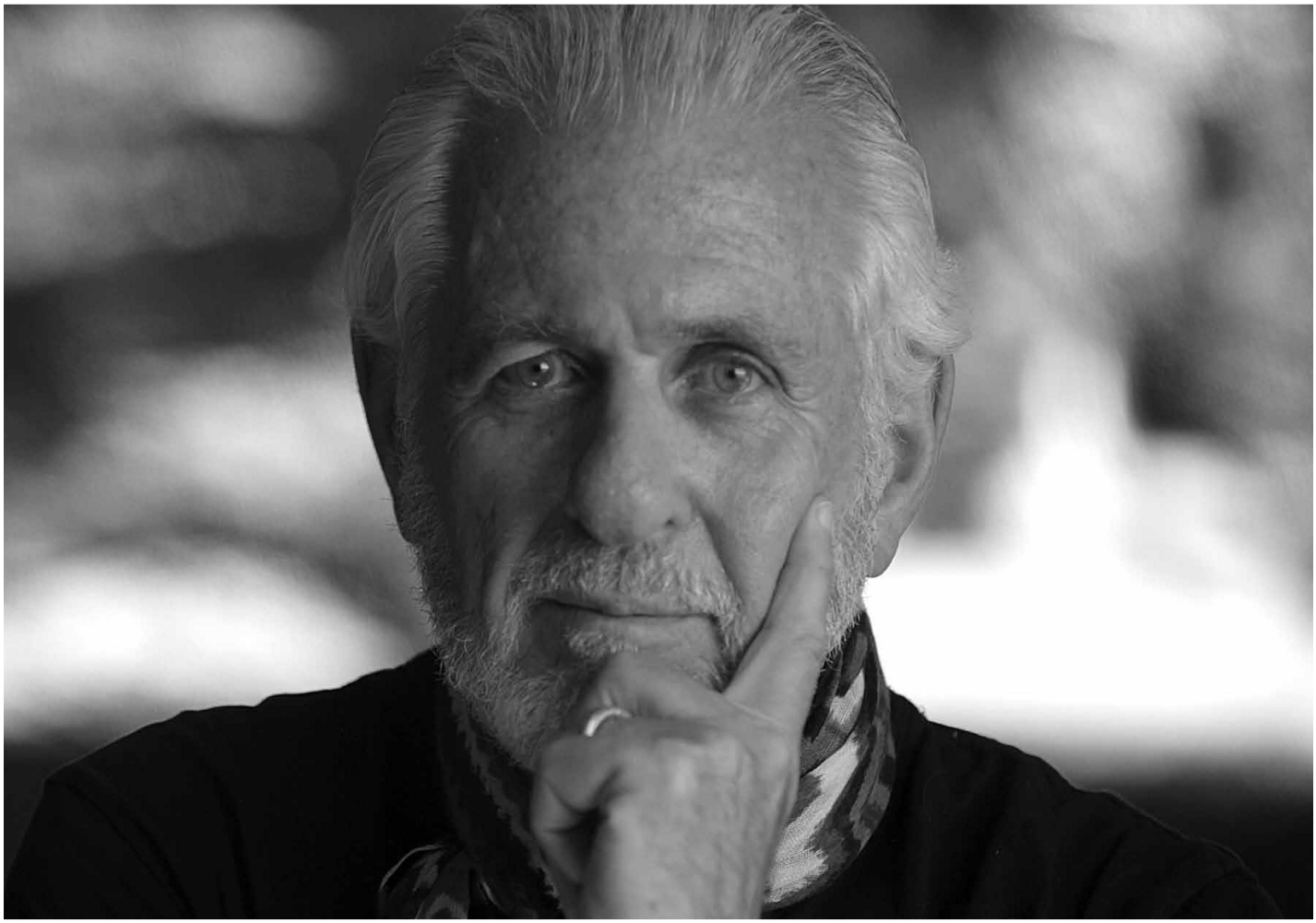
Retired Chinese basketball player who last played
for the Houston Rockets of NBA; investor.

TAN **DUN**

Grawemeyer, Oscar, and Grammy awarding winning
Chinese contemporary classical composer
http://en.wikipedia.org/wiki/Tan_Dun

ZHANG **YONG HE**

Chinese-American architect, former head of architecture
at MIT.

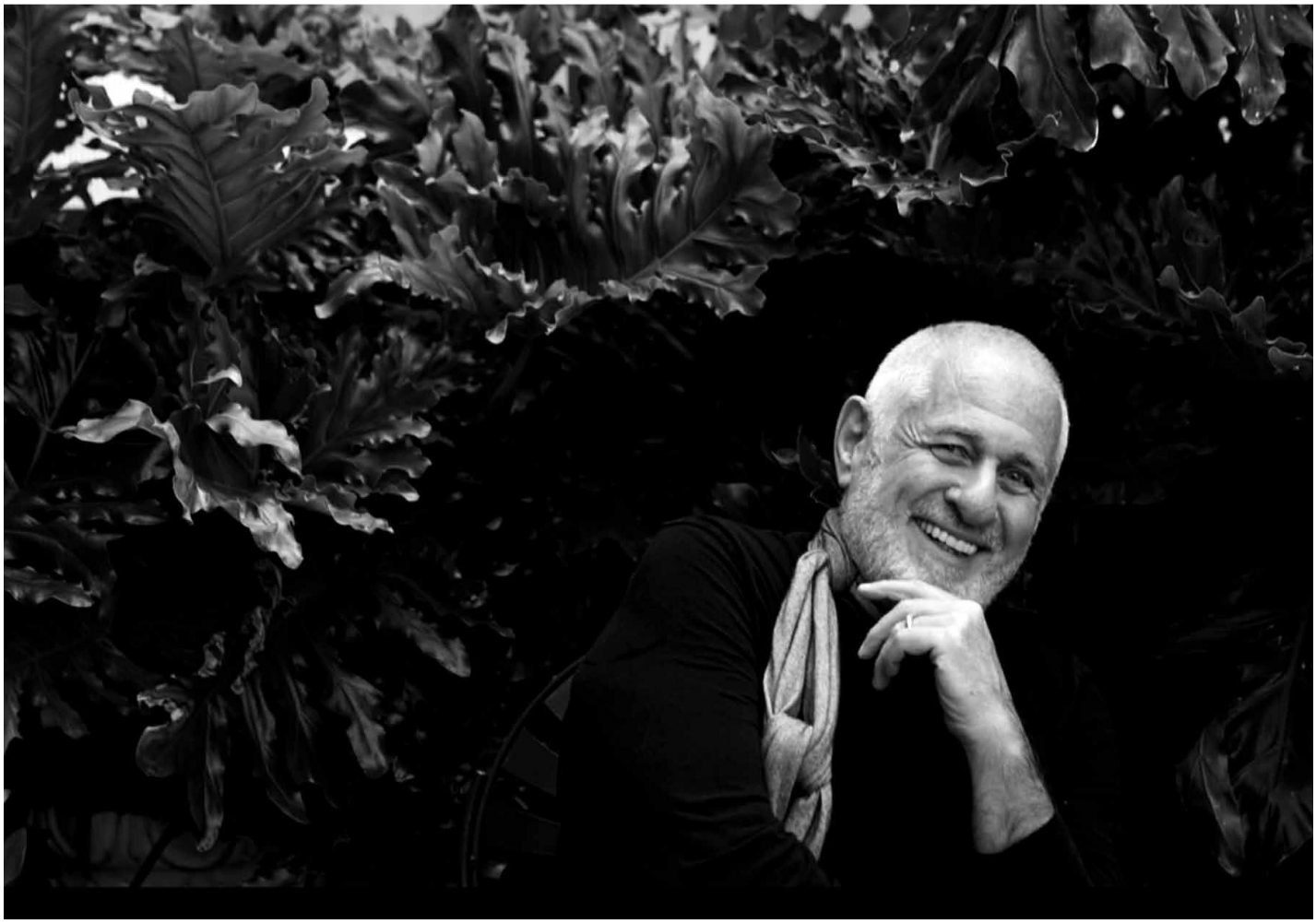


RICHARD SAUL **WURMAN**

Described by *Fortune* magazine as an "intellectual hedonist" with a "hummingbird mind," Richard Saul Wurman seeks ways to make the complex clear. Recognizing at an early age that his ignorance is his greatest asset, he has made it his mission to sort through the abundance of information that is available on every topic, and design the techniques to make it understandable.

In doing so he has continually sought to put himself in the presence of extraordinary people, including (all now all deceased), Francis Crick, Richard Feynman, Jonas Salk, Eva Zeisel, Louis I. Kahn, Charles Eames, Frank Stanton and Schuyler van Renssalaer Cammann, and Arnold Toynbee. There are many others. The only two bosses he had who didn't fire him were Lou Kahn and Charlie Eames.

As a result, Wurman has had many lives: as an author (83 books); FAIA Architect, 13-year partner in Murphy Levy Wurman Architects; cartographer (mapped 1/3 of the Mayan city of Tikal and current project 19.20.21.); teacher (Cambridge University, England; Princeton; Washington University, St. Louis; University of Southern California; University of California Los Angeles; City College of New York, and Dean, Cal Poly School of Design); urban designer (recipient of MIT's Kevin Lynch award in urban design); graphic designer (AIGA Gold Medal, membership in AGI and inducted into the Art Directors Hall of Fame); information theorist (*Information*



Anxiety, Follow the Yellow Brick Road) and in medicine (6 books on healthcare and creator and chairman of TEDMED, 1995–2010), and as a conference convener. The path of this journey has been paved by one surface: his curiosity.

The acknowledged father of Information Architecture, Wurman has written, designed and published 83 books on a range of topics, while creating conferences and new mapping projects. All contribute to a greater understanding of complex information. They spring from his particular brand of innovation: doing the opposite of what is rote or expected.

Wurman published his first two books in 1962. The first featured models of 50 world cities all constructed on a uniform scale, the other was the first book to be written on Louis Kahn. In 1967 he co-authored the first comparative statistical atlas of major American cities. His latest book is called *33: Understanding Change & the Change in Understanding*. It chronicles the adventures and musings of the eccentric main character, the Commissioner of Curiosity and Imagination.

Wurman created the *ACCESS* city guides, using graphics and logical editorial organization to make places such as New York, Tokyo, Rome, Paris and London understandable to visitors. Other volumes he created focus on topics such as baseball, football and the 1984 Olympics, the latter with over with 3.2 million copies sold. His road atlases employed similar techniques that elucidate U.S. geography and transportation networks. In addition he completed many one-off projects, such as his book *Twin Peaks Access*, which he co-authored with David Lynch. Several of his books are in the permanent collection of the Museum of Modern Art, New York.

Wurman began his career in conferences in 1972 when he chaired the International Design Conference in Aspen. He then co-chaired the first Federal Design Assembly in 1973 and the national AIA Conference in 1976. With each of these he changed the fundamentals of how gatherings were run. All these helped his creative molding of TED, TEDMED, and eg, the Entertainment Gathering.

Wurman created the TED conference in 1984, which he chaired through the 2002 meeting. TED brings together many of America's clearest thinkers in the fields of technology, entertainment and design. He created the eg conference in 2006 and the TEDMED conference in 1995, which he chaired through 2010. Other conferences he created and chaired include California 101, TEDSELL, TEDNYC, TED4Kobe in Japan and TEDCity in Toronto.

Now in 77, Wurman continues to quell his restlessness with a series of new projects. The WWW Conference will be an active gathering of some of the brightest thinkers of our time discussing the complexity of emerging patterns on our planet in improvised conversation – intellectual jazz. In partnership with Esri and @radical.media, 19.20.21. is a major cartographic initiative that endeavors to standardize a methodology for comparative urban data. His Urban Observatory project aims to establish, for the first time ever, a series of live and changing electronically connected urban observatories around the world.

Wurman received both his B.Arch. and M.Arch. degrees with highest honors from the University of Pennsylvania in 1959. While there, he was awarded the Arthur Spayd Brooks Gold Medal, the Thornton Oakley Award for Achievement in Creative Art, 2 Chandler grants and two graduate fellowships. He has also been awarded a Guggenheim Fellowship in Architecture and Design, three honorary doctorates, two Graham Fellowships and numerous grants from the National Endowment for the Arts. He is the 2012 Lifetime Achievement Award recipient given by The Smithsonian Cooper-Hewitt National Design museum. He was recently given the Gold Medal for Outstanding Contribution to Public Discourse by Trinity College Dublin, an honor shared in the past by Archbishop Desmond Tutu and Aung San Suu Kyi.

Wurman currently lives in Newport, RI with his wife, novelist Gloria Nagy, and their three yellow Labradors, Abraham, Isaac and Jacob. They have four children and six grandchildren.

MEMO TO PARTICIPANTS re: CONVERSATIONS

As most of you are aware, I created TED in 1984 and chaired it through 2002. During that time I created TEDMED in 1995 and the eg Conference in 2006. For all those meetings I developed an 18-minute talk and a series of rules called the *TED Commandments*.

Several of you have asked 'well what are the new guidelines as they relate to the WWW Conference'?

1 Participants have all been sent the schedule listing the person with whom they have been paired, attached again below.
2 If you go to the participants page on the web site, you can click on that person's name and link to his or her biographical information.
3 I have developed a list of 30 different premises or postulations that will begin you in improvised conversation.
4 I have tried this and it works.
5 You will be facing each other on comfortable couches and not the audience.
6 There will be approximately 150 people in the audience, which will be comprised of fellow participants, guests and individuals invited by sponsors.
7 Absolutely no preparation is necessary.
8 You will not be selling a book, charity, project or religion.
9 As long as the conversation holds my attention and my perceived attention of the audience, you will be in conversation. At the conclusion, I will with reasonable politeness call up the next two individuals.
10 If the conversation is fabulous but goes on so long as to potentially cause us to miss our lunch, I will also end it and the two of you can continue it over lunch.
11 There will be no lectern but there will be a side table for a cup of coffee or glass of water.
12 There is no strict time schedule but I will attempt to keep the order of the final schedule.
13 On occasion I might take the liberty part way into a given conversation to add a third person, another participant or simply another member of the audience, whom I know can add constructively to the conversation.
14 The entire meeting will be filmed as inconspicuously as possible from the far left and right of the stage and with one small camera in the audience.
15 At this moment there are no plans to live-stream any of the conference. There will be an app with access to a server to hold the conversations. It is planned that this will be available on 1 December and will include a running line of translation into several languages.
16 The app will also contain a large body of curated personal information about you. Further explanation about this will come to you next week.
17 I have personally worked out the breaks, lunches and dinners and I believe they will be of the highest quality and in rooms that will delight you, both at Esri and at The Mission Inn.
18 Obviously there is a lot of risk about the conversations, particularly the quality, spontaneity, clarity, improvisation and surprise.
19 The goal is to find some threads that have not emerged before as you speak with your partner, which will encapsulate a type of honesty and a non-predicted path in response to each other.
20 This has happened in my several tests of this idea.
21 To repeat, I am endeavoring to make the filming, ambiance, location and lack of press all focus on your comfort and the quality of your experience. This above all is my concern and my goal.
22 Improvised conversation in this manner is a new form but a wonderful conversation is perhaps the oldest human media for creative discourse. So in that sense, this is **a great leap backwards.**
23 It will be a wonderful salon and an absolutely immersive experience with extraordinary people.

MEMO TO PARTICIPANTS re: FUTURE APP

I trust each of you has read my 24-point memo called *WWW Conference Conversation Guidelines* with 24 points that I believe give the spirit of the meeting itself. I've had excellent response from many of you as well as from sponsors and attendees. This memo addresses the outcome of the conference, in other words, what I do with the filming of these approximately 30 conversations.

1 It will be filmed in black and white by a team directed by Jon Kamen and Sidney Beaumont of @radical.media, and John Halloran of John Halloran Associates.
2 It will be unedited. There will be a camera on each of the individuals in conversation, as well as a long camera on the three of us sitting on stage.
3 Michael Smolens and David Orban of dotSUB will then translate it into perhaps 10 languages and add a running translation in English, which will address the language needs of 90% plus of the world's population.
4 This will live on a server and be accessed by an app that has a release date at this juncture of 1 December. The app will also contain a great deal of additional information on each of the presenters.
5 The additional curated stuff—photos, videos, and links is what this memo is focused on.
6 Scrollmotion has already done two extraordinary versions of the organization and design of this app. They have offices in San Diego and New York City.
7 There will be a series of unique videos on which I will comment later, made where appropriate of you in situ.
8 The video of the entire conference of course can be accessed by pairings of speakers from a list and viewed as you would at the conference showing individuals in improvised conversation. However, one could also double click on a single name and go into this visual biography of each of the participants.
9 The demo can be found at http://vimeo.com/user7992663/review/47187545/29ddc526f0 The password is WWW. It shows an extremely brief version of C. K. Williams, the Pulitzer Prize winning poet, in which you cannot only see a bio, for which we will ask a major expansion, but also photographs of the covers of a few of his 11 books. We would also like to have all of his books, which you will be able to order form the app, some outtake videos, not from the conference but from other sources that we would identify, and that you will identify, as well as, in the case of C. K. Williams, many pages, a few shown here, of his personally edited writings of his poetry—something you can't find on YouTube, a presentation or in a book, or perhaps anywhere but this app.
10 The idea of this app is to get a behind the scenes, behind the curtain, personalized journey through each individual, which will also have a list of links to suggested articles, reviews, YouTubes and other material that will fill out this visual biography.
11 This is an important point: if you Google Richard Wurman, you come up with perhaps 450,000 citations. The number changes daily. This would amount to 40,000+ pages, which of course nobody looks at. Basically it's junk big data, and people mostly focus on one article and a wikipedia entry. The attempt here is to have the first primitive development of a platform for beginning to assuage some curiosity in the beginning of looking at a visual biography of at least these 50 people. If the platform works it's scalable. That's the idea of a new modality. If it works for people perhaps it will work for healthcare and other subjects.
12 I'm putting together a team of people consisting of Ali Smolens, who will help curate some of the materials for many of you, Paul Kandarian, a magazine writer friend of mine from Rhode Island, and three others plus Blaise Zerega, CEO of FORA.tv who has agreed to make some original, simple videos such as Frank Gehry walking around his office showing and discussing models of buildings that he has not built, or variations of for instance the 8 Spruce Street tower in New York or hopefully Craig Venter's laboratories in a walk-through, E.O. Wilson's offices, etc. etc.
13 So this is a request for the following: please start thinking about the stuff that you've never shown: everything from baby pictures, pictures of your pets, pictures of your office, pictures of your home, things that make you real. Multiple photographs of yourself, perhaps a strip of photographs of you taken in a photo booth at an amusement park that you have in a drawer. Writings that you've done that show your edits, something that shows you're real, human, and shows your process. Pictures of your laboratories. Agree to have somebody do a 5- or 10-minute walk through with you in your office or your lab or your place of work or your architectural studio. Videos or DVDs that for example I know Moshe Safdie has which he makes to describe what a building will look like in computer graphics to a client. I know he has a fantastic one of an apartment house in Singapore. And I'm sure Bjarke has similar things that he generally does not release. Covers of books about you, covers of books by you. A list of articles that you think critically describes you and links to YouTubes or other videos or other citations that you think and you have curated yourself that make you particularly interesting, not the half a million available on line. Julie Taymor most have lots of stuff as well as David Blaine.
14 We hope to have this put together, along with the entire conference, for release by 1 December and promote it immediately after Thanksgiving with the help of IDG, Flipboard (Mike McCue), Esri, IIR and others. I am going to ask for your cooperation out in Redlands at the conference and I will have additional copies of this and the other memo to give you when you register.
15 Attached are technical specifications for those of you who understand them yourself. Otherwise please show them to somebody in your office under the age of 30 who automatically understands them, who could help us translate whatever you send us in a usable format. I don't understand them myself but I'm sure some of you have a better handle on this than I do. These will make the process smooth and efficient and within budget.

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From: Lisa Randall [redacted]]
Sent: 11/28/2012 4:17:19 PM
To: Jeffrey Epstein [jeevacation@gmail.com]
Subject: Fwd: Invite to Dialog 2014 (16 months away)

Importance: High

Is this worthwhile?

-------- Original Message --------
Subject: Invite to Dialog 2014 (16 months away)
Date: Wed, 28 Nov 2012 08:05:58 -0800
From: Auren Hoffman <[redacted]>
To: <[redacted]

Dear Fouad,

Dear Lisa ï¿½

You are invited to join us at Dialog 2014 -- a two-day bipartisan retreat discussing how to change the world.

There will be no speeches ï¿½ just many moderated break-out discussions of 6-15 people on various topics. And we design the agenda around your ideas and needs.

Please let us know if you would like to join us,

/- Peter Thiel and Auren Hoffman/

p.s. and yes, we know Dialog 2014 is 16 months away, but we are giving you a chance to sign up now

DETAILS:

Youï¿½re invited to join us at the Dialog Retreat ... 150 people to change the world ... a participatory and entrepreneurial conversation on changing the world.

The *Dialog//*participants areï¿½t modest. We want to change the world. But we doï¿½t want to spend our time being in a large audience listening to winded speeches. There are no speakers. No panels. All attendees participate in break-out facilitated discussions. And we *limit the discussion to only 150 global leaders*who can have an impact now and emerging leaders who can help implement the plans we develop.

*Dates**:*March 13-15, 2014
Location: Sundance Resort, Utah (40 minutes from the Salt Lake City airport)

/We've rented out the entire resort/

Register at:

http://dialog2014.eventbrite.com

password: dialog2014

You qualify for a significant discount on the retreat fee. On the registration page, click on the link that says 'Enter promotional code' and enter:

AcademicDialoger

/note: the invite is only for Lisa Randall and is not transferable as we are limited to only 150 participants. There are no sponsors. We increase the retreat fee weekly to reward the people that sign up early. And this retreat is 100% off-the-record. /

We hope you can join us.

Dialog participantsï¿½

/ï¿½ partial list of people who will be participating in the 2013 Dialog Retreat (all are references): /

*Veronica Allende Serra**ï¿½ Founding Partner, Pacific Investments. Chm, Portal de Documentos. Boards: Allied Advanced Technologies, Wow! Nutrition, Mercado Libre, ISmart Foundation.*

*Susan **Athey*-- Professor of Economics, Harvard University. Chief Economist, Microsoft. 2007 Winner of John Bates. Clark Medal.

*Byron **Auguste*-- Director and Head of Social Sector Office, McKinsey & Co. Chm, Hope Street Group.Boards: William and Flora Hewlett Foundation; Pacific Council on International Policy; Center for American Progress.

*David Barron*ï¿½ Professor, Harvard Law School. Fmr Acting AsstU.S. Attorney General in the Office of Legal Counsel.

Kirsten Bartok-- CEO, AirFinance. Fmr CFO of XOJet. Fmr GP at Alpine Investors.

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*Nick Beim*ï¿½ GP, Matrix. Boards: Gilt Groupe, TheLadders, Care.com, Conductor, Intent Media, BuyWithMe.

*Nicolas **Berggruen*-- President, Berggruen Holdings.

*Charles Best*ï¿½ CEO, DononrsChoose.

*Elizabeth Blackburn*ï¿½ Prof of Biology and Physiology, UCSF. 2009 Winner of Nobel Prize in Medicine. President, American Association of Cancer Research.

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*John Burbank*ï¿½ CEO, Passport Capital.

*John Burbank*ï¿½ President, Nielsen Strategic Initiatives. Fmr CEO of Online, Nielsen. Fmr CMO, Nielsen. Fmr CMO, AOL.

*Leah Busque*ï¿½ Founder, TaskRabbit.

*Marc Cenedella*ï¿½ CEO, TheLadders.

*Stephen Cohen*ï¿½ cofounder, Palantir.

*Gio Colella *ï¿½ CEO, Castlight Health. Fmr CEO, RelayHealth.

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*Adam Dï¿½Angelo*ï¿½ CEO, Quora. Fmr CTO, Facebook.

*Mitch Daniels **ï¿½ President, Purdue University. Governor, State of Indiana (2005-2013). Fmr Director, Office of Management and Budget (2001-2003). *

Lanny Davis-- FmrSpecial Counsel to the President (under Clinton).Author of Scandal and The Emerging Democratic Majority.

*Ken Denman*ï¿½ CEO, Machine Perception Technologies. Fmr CEO of Openwave. Fmr CEO of iPass (IPAS). Fmr CEO, AuraServ Communications. Fmr SVP MediaOne. National Markets.

*Marc Ecko*ï¿½ Chief Creative Officer, Marc Ecko Enterprises. Award-winning artist.

*RP Eddy *ï¿½ CEO, Ergo. Fmr Director, White House National Security Council. Fmr Chief of Staff to U.N. Ambassador Richard Holbrooke. Sr Fellow, Manhattan Institute.

*Juan Enriquez*ï¿½ CEO, Biotechonomy. Founding Director of the Life Sciences Project, Harvard Business School. Boards: Cabot Corp, Craig Venter Institute. Fmr CEO, Mexico City ï¿½s Urban Development Corporation.

*Jeff Epstein*ï¿½ fmr CFO, Oracle. Fmr CFO, DoubleClick. Fmr CFO, King World Productions. Boards: Priceline.com, Stanford University Hospital.

*Niall Ferguson*ï¿½ Prof History, Harvard. Author of /The Worldï¿½s Banker: The History of the House of Rothschild/,/The Cash Nexus/,/Empire, Colossus/,/The War of the World, The Ascent of Money/, and others.

*Brad Garlinghouse*ï¿½ CEO, YouSendIt.

*Julius Genachowski*ï¿½ Chairman, Federal Communications Commission (FCC).

*Jared Genser*ï¿½ MD, Persesus Strategies. Founder, Freedom Now. International lawyer for Aung San Suu Kyi.

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*Ash Gupta*ï¿½ Chief Risk Officer, American Express.

*Richard Haass*ï¿½ President, Council on Foreign Relations. Fmr Director of Policy Planning, U.S. State Department. Fmr U.S. Special Envoy to Northern Ireland.

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*Hollie Moore Haynes*ï¿½ MD, Silver Lake Partners.

Bob Hertzberg-- Chairman, G24 Innovations.Partner, Mayer Brown Rowe & Maw. Fmr Speaker, California State Assembly (2000-2002). Fmr Regent, University of California. Fmr Chm, Mayor Antonio Villaraigosa transition team. Board: Solar Integrated Technologies (Chm), California Historical Society, MALDEF, Town Hall Los Angeles, Century Housing.

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*Reid Hoffman*ï¿½ Chairman and founder, LinkedIn. Partner, Greylock. Boards: DoSomething, Kiva, Endeavor Global, Mozilla. Zynga.

*Jacob Hsu*ï¿½ CEO, Symbio.

*Daisuke Iwase*ï¿½ cofounder and COO, Lifenet Insurance (top life insurance company in Japan).

*Christian Johansson*ï¿½ Secretary of Department of Business and Economic Development (DBED), State of Maryland. Fmr CEO, Economic Alliance of Greater Baltimore.

*David Kamenetzky*ï¿½ Group Head, Mars & Co.

*PV **Kannan*ï¿½ CEO, 24/7 Customer.

*Andy **Karsner*ï¿½ CEO, Manifest Energy. Fmr U.S. Asst Sec of Energy for Energy Efficiency and Renewable Energy (2005-2009). Fmr Managing Director, Enercorp. Boards: Applied Materials, Conservation International.

*Garry Kasporov*ï¿½ Fmr World Chess Champion. Chm, United Civil Front of Russia.

*Neal **Katyal*ï¿½ Partner, Hogan Lovells. Fmr Acting Solicitor General for the United States (2010-2011). Professor of Law, Georgetown U. Lead counsel for the plaintiff in Supreme Court case Hamdan vs. Rumsfeld.

*Terry Kawaja *ï¿½ CEO, Luma Partners.

*Juliette Kayyem*ï¿½ Foreign Affairs Columnist, Boston Globe. Lecturer in Public Policy, Harvard. Asst Sec. for Intergovernmental Affairs, U.S. Dept. of Homeland Security.

*Jeff Kearl*ï¿½ Chm, SkullCandy.

Peter Kellner-- MD, Richmond Management. Cofounder, Endeavor. Fmr partner, VectisGroup.

Chris Kelly-- Fmr Chief Privacy Officer and Head of Global Public Policy at Facebook . Fmr Chief Privacy Office, Excite@Home.

*Pradeep **Khosla*ï¿½ Chancellor, UC San Diego. Fmr Dean of College of Engineering, Carnegie Mellon.Boards: Quantpoint, BioMatricore, BitArmor, Childrenï¿½s Institute, IIT Foundation, Mellon-Pitt Corp.

*Charlie Kim*ï¿½ CEO, NextJump.

*David Kirkpatrick*ï¿½ Author, /The Facebook Effect/. Fmr head technology writer, FORTUNE.

*Henry Kravis*ï¿½ Co-CEO of KKR. Chm, First Data. Boards: Claremont McKenna College, Metropolitan Museum of Art, Mount Sinai Medical Center, Council on Foreign Relations, Columbia Business School, Rockefeller University, others. Fmr Chair, Partnership for New York City.

*Marie-Josee Kravis*ï¿½ Boards: Publicis, LVMH. Boards: Memorial Sloan-Kettering Cancer Center, Robin Hood Foundation, Council on Foreign Relations, Qatar Museum Authority. President, Museum of Modern Art board of directors. Fmr Board: Ford, IAC, CIBC.

*Will Lansing*ï¿½ CEO, FICO (NYSE: FICO). Fmr CEO, InfoSpace. Fmr CEO, NBC Internet. Fmr COO, Prodigy Communications.

*Renaud Laplanche*ï¿½ CEO, Lending Club.

Laura and Gary Lauder-- General Partners, Lauder Partners. Cofndrs, Socrates Society.

*Jenna Lee*ï¿½ Anchor, Fox News. Host, /Happening Now/ on Fox News.

*Jorge Lemann*ï¿½ Fmr Owner, AmBev (largest brewery in Latin America) and now one of the largest shareholders in Anheuser-Busch InBev. Boards: Lojas Americanas, Gillette, Swiss Re, Burger King.

*Max Levchin*ï¿½ fmr CEO, Slide. Fmr co-founder, PayPal.

*Jonathan Levin*ï¿½ Prof and Chair of Dept of Economics, Stanford. 2011 Winner of the John Bates Clark Medal.

*Ann Lewis *ï¿½ President, NoLimits. Fmr Director of Communications to the U.S. President (1997-2000).

*Rob LoCasio*ï¿½ CEO, LivePerson (NASDAQ: LSPN).

*Jeremy Liew*ï¿½ GP, LightSpeed Venture Partners. Investor in: Bonobos,

CarDomain, Flixster, Focus, Kixeye, Kongregate, LivingSocial, Playdom, RockYou, ShoeDazzle, and others.

*Joe Lonsdale*ï¿½ CEO, Adepar. cofounder, Palantir.

*Doreen Lorenzo *ï¿½ President, Frog Design.

*Bob **Luskin*-- Partner and Co-Chair of Litigation Dept, Patton Boggs.Attorney to Karl Rove and Lance Armstrong. Fmr Chief Counsel to the Organized Crime & Racketeering Section of DOJ .

*Jorn Lyseggen*ï¿½ CEO of Meltwater.

*John Maeda*ï¿½ President, Rhode Island School of Design. Author, /Laws of Simplicity./

*Divesh Makan*ï¿½ CEO, Iconiq Capital.

*Meyer **Malka**ï¿½ co-CEO, Lemon. *

*Andy McAfee*ï¿½ Principal Research Scientist at the Center for Digital Business, MIT. Author of /Race Against the Machine. /

*General Stan **McChrystal**ï¿½ Ret. 4-star U.S. General. Led all U.S. forces in Afghanistan. *Fmr Commander, Joint Special Operations Command.*Current Principal, *McChrystal*Group. Sr. Fellow, Yaleï¿½s Jackson Institute for Global Affairs.*

*Andrew McLaughlin**ï¿½ Fmr VP, Tumblr. Fmr Deputy CTO of the United States, White House. Fmr Dir of Public Policy, Google. Boards: Public Knowledge, Code for America. *

*Dmitri **Mehlhorn**ï¿½ COO, *StudentsFirst*.*

*Lenny **Mendonca*-- Director, McKinsey. Head of McKinseyï¿½s strategy practice. Chm, McKinsey Global Institute. Chm, Bay Area Council. Board: McKinsey & Co, Economic Institute of the Bay Area, Bay Area Science and Innovation Consortium, The New America Foundation, Common Cause, Committee for Economic Development, ChildrenNow, and DonorsChoose.

*Eugene Meyer*ï¿½ President, Federalist Society.

*Chris Michel**ï¿½ GP, Nautilus Ventures. Award-winning photographer. *Fmr*CEO, Affinity Labs. *Fmr*CEO, Military.com. Boards: International Data Group, Dale Carnegie, *Kixeye*, *Castlight*Health, USO, *Marine*Corps University Foundation. *

*Katie Mitic **ï¿½ Fmr Head of Platform Marketing, Facebook. Fmr SVP, Palm. Fmr VP Product Strategy, Yahoo! Fmr Fndr and CEO, Four11. Boards: eBay, Special Olympics International. *

Wes Moore-- Author, ï¿½The Other Wes Mooreï¿½. Fmr. Special Assistant to Secretary of State Rice. Fmr Director of Information Operations, 82nd Airborne Division, US Army, Afghanistan 2005-2006.

*Nader Mousavizadeh*ï¿½ CEO of Oxford Analytica.

*Luke Muehlhauser*ï¿½ Exec Director, Singularity University.

*Matt Mullenweg *ï¿½ Founder, Wordpress.

Roger Myerson-- Prof of Economics, U of Chicago. 2007 winner of Nobel Prize in Economics.

*Scott Nathan*ï¿½ Partner, Baupost Group.

Meghan Oï¿½Sullivan-- Professor, Harvard Kennedy School of Govt. Fmr Deputy National Security Advisor for Iraq and Afghanistan, President George W. Bush. Mbr, Trilateral Commission.

*Chamath **Palihapitiya*ï¿½ CEO, Social+Capital. fmr VP Growth, Mobile, and International at Facebook. Fmr GM of AIM at AOL. Boards: SecondMarket, FixYa, Lemon, Integrated Plasmonics. Co-Owner, Golden State Warriors.

*Eli **Pariser**ï¿½*Fmr President, MoveOn.Cofndr, Avaaz.org. Boards: MoveOn, Avaaz, New Organizing Institute and Simonï¿½s Rock College.

*Mark Penn*ï¿½ Corp VP of Strategic Projects (reports to the CEO), Microsoft. Fmr CEO, Burson-Marsteller. President, of polling firm Penn, Schoen and BerlandAssociates. Fmr Chief Strategist, Hillary Clinton for President 2008. Author, Microtrends. Fmr pollster to President Clinton. Fmr pollster to Prime Minister Tony Blair.

*Lois Quam*ï¿½ Executive Director, Global Health Initiative ï¿½ part of the State Department and she reports directly to Secretary Clinton. Fmr CEO of Public and Senior Markets, UnitedHealth Group ($30 billion division).

*Dan Rosensweig *ï¿½ CEO, Chegg. Fmr CEO, Guitar Hero. Fmr COO, Yahoo.

*Robert Rubin*ï¿½ Co-Chairman, Council on Foreign Relations. Fmr U.S. Secretary of the Treasury (1995-1999). Fmr Director, National Economic Council (1993-1995). Chm, Local Initiatives Support Corporation (LISC). Fmr Co-Chairman, Goldman Sachs.

*Sal Russo*ï¿½ Founder, Tea Party Express. Partner, Russo Marsh.

*Tod Sacerdoti*ï¿½ CEO, BrightRoll. Board: ReTargeter.

*Amy Salzhauer *ï¿½ CEO, Ignition.

*Cami Samuels*ï¿½ General Partner, Versant Ventures. Boards: Achaogen, APT Pharmaceuticals, Kythera Biopharmaceuticals, Semprae Laboratories.

Ken Sawyer-- CEO, Saints Ventures (manages over $1 billion in capital). Selected to Forbes Midas List. Boards: Continuous Computing, HK Systems, Cleargauge, Travel Intelligence, Envivio, Alliance Consulting, Acsis and Laureate Pharmaceuticals.

*Jessica Schell*ï¿½ EVP BD and Strategic Planning, Universal Pictures. Fmr SVP Digital Strategy and Business Development, NBC Universal. Board: World Wide Biggies.

*Barry Silbert *ï¿½ CEO of SecondMarket.

*Josh Silverman*ï¿½ President of US Consumer Services, American Express. Fmr CEO, Skype. Fmr CEO, Shopping.com. Fmr CEO and Fndr, eVite.

*Sukhinder Singh Cassidy*ï¿½ Chm, JOYUS. Fmr CEO, Polyvore. Fmr President of Asia Pacific and Latin America, Google. Boards: TripAdvisor (TRIP) and Formspring.

*Megan Smith*ï¿½ VP Business Development, Google. Fmr CEO, PlanetOut.

*Charles **Songhurst*-- GM and Head of Strategy and M&A, Microsoft. MD, Katana Capital.

*Angelo Sotira*ï¿½ CEO, DeviantArt.

Bret Stephens-- Member of Editorial Board, Wall Street Journal. Main Foreign Affairs Columnist, Wall Street Journal. Fmr Editor-in-Chief, Jerusalem Post.

*Simon Stevens*ï¿½ EVP, UnitedHealth Group. Fmr CEO, Ovations (revenues of $31 billion). Fmr Health Policy Director to British Prime Minister Tony Blair.

*Henry Sweica*ï¿½ CEO, Talpion Fund Management. Fmr co-founder, Highbridge Capital Management.

Alexander Tamas- Partner, DST. Boards: Forticom, mail.ru

Peter Thiel-- CEO of Thiel Capital. Managing Director, Founders Fund. Fmr founder and CEO of PayPal. Boards: Facebook and Palantir.

*Steve Wayne *ï¿½ CEO, Jensen Group.

*Will Wechsler*ï¿½ Deputy Asst. Sec of Defense for Counternarcotics and Global Threats.

*Adam Weiss**ï¿½ co-CEO, Scout Capital. *

*Katharine Weymouth**ï¿½ Publisher, Washington Post.*

*Michael Wolf*ï¿½ CEO, Activate. fmr President and COO, MTV Networks. Fmr Prtnr, McKinsey. Former Senior Partner, Booz Allen & Hamilton.

*Paul Wolpe*ï¿½ Director, Center of Ethics. Prof of Bioethics, Emory. Sr Bioethicist, NASA. Co-Editor, American Journal of Bioethics.

*Jed York*ï¿½ CEO of San Francisco 49ers.

*Lauren Zalaznick*ï¿½ Chairman, Entertainment & Digital Networks and Integrated Media, NBCUniversal. She oversees Bravo, Oxygen Media, Style, PBS Sprout, Telemundo, iVillage, Swirl, Daily Candy, and Fandango.

*Eric Zinterhofer ï¿½ *co-CEO, Searchlight Capital. Chm, Charter Communications. Fmr Sr Partner, Apollo Management. Boards: Central European Media Enterprises, Dish TV India.

*Karl-Theodor zu Guttenberg*ï¿½ fmr Minister of Defense, Germany. Fmr Minister of Economics and Technology, Germany.

From: [redacted] [redacted]
Sent: 11/28/2012 5:28:55 PM
To: Jeffrey Epstein [jeevacation@gmail.com]
Subject: Re: Invite to Dialog 2014 (16 months away)

Importance: High

So let me understand. You are suggesting tourism?
Sent from my Verizon Wireless BlackBerry

From: Jeffrey Epstein <jeevacation@gmail.com>
Date: Wed, 28 Nov 2012 11:28:51 -0500
To: Lisa Randall [redacted]>
Subject: Re: Invite to Dialog 2014 (16 months away)

sundance is nice ,, go

On Wed, Nov 28, 2012 at 11:17 AM, Lisa Randall [redacted] wrote:

Is this worthwhile?

-------- Original Message --------
Subject: Invite to Dialog 2014 (16 months away)
Date: Wed, 28 Nov 2012 08:05:58 -0800
From: Auren Hoffman <[redacted]>
To: <[redacted]>

Dear Fouad,

Dear Lisa –

You are invited to join us at Dialog 2014 -- a two-day bipartisan retreat discussing how to change the world.

There will be no speeches … just many moderated break-out discussions of 6-15 people on various topics. And we design the agenda around your ideas and needs.

Please let us know if you would like to join us,

/- Peter Thiel and Auren Hoffman/

p.s. and yes, we know Dialog 2014 is 16 months away, but we are giving you a chance to sign up now

DETAILS:

You're invited to join us at the Dialog Retreat ... 150 people to change the world ... a participatory and entrepreneurial conversation on changing the world.

The *Dialog//*participants aren't modest. We want to change the world.
But we don't want to spend our time being in a large audience listening to winded speeches. There are no speakers. No panels. All attendees participate in break-out facilitated discussions. And we *limit the discussion

to only 150 global leaders*who can have an impact now and emerging leaders who can help implement the plans we develop.

*Dates**:*March 13-15, 2014
Location: Sundance Resort, Utah (40 minutes from the Salt Lake City airport)

/We've rented out the entire resort/

Register at:

http://dialog2014.eventbrite.com

password: dialog2014

You qualify for a significant discount on the retreat fee. On the registration page, click on the link that says 'Enter promotional code' and enter:

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We hope you can join us.

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Joe Lonsdale– CEO, Adepar. cofounder, Palantir.

*Doreen Lorenzo *– President, Frog Design.

*Bob **Luskin*-- Partner and Co-Chair of Litigation Dept, Patton Boggs.Attorney to Karl Rove and Lance Armstrong. Fmr Chief Counsel to the Organized Crime & Racketeering Section of DOJ .

Jorn Lyseggen– CEO of Meltwater.

John Maeda– President, Rhode Island School of Design. Author, /Laws of Simplicity./

Divesh Makan– CEO, Iconiq Capital.

*Meyer **Malka**– co-CEO, Lemon. *

Andy McAfee– Principal Research Scientist at the Center for Digital Business, MIT. Author of /Race Against the Machine. /

*General Stan **McChrystal**– Ret. 4-star U.S. General. Led all U.S. forces in Afghanistan. *Fmr Commander, Joint Special Operations Command.*Current Principal, *McChrystal*Group. Sr. Fellow, Yale's Jackson Institute for Global Affairs.*

*Andrew McLaughlin**– Fmr VP, Tumblr. Fmr Deputy CTO of the United States, White House. Fmr Dir of Public Policy, Google. Boards: Public Knowledge, Code for America. *

*Dmitri **Mehlhorn**– COO, *StudentsFirst*.*

*Lenny **Mendonca*-- Director, McKinsey. Head of McKinsey's strategy practice. Chm, McKinsey Global Institute. Chm, Bay Area Council. Board: McKinsey & Co, Economic Institute of the Bay Area, Bay Area Science and Innovation Consortium, The New America Foundation, Common Cause, Committee for Economic Development, ChildrenNow, and DonorsChoose.

Eugene Meyer– President, Federalist Society.

*Chris Michel**– GP, Nautilus Ventures. Award-winning photographer. *Fmr*CEO, Affinity Labs. *Fmr*CEO, Military.com. Boards: International Data Group, Dale Carnegie, *Kixeye*, *Castlight*Health, USO, *Marine*Corps University Foundation. *

*Katie Mitic **– Fmr Head of Platform Marketing, Facebook. Fmr SVP, Palm. Fmr VP Product Strategy, Yahoo! Fmr Fndr and CEO, Four11. Boards: eBay, Special Olympics International. *

Wes Moore-- Author, "The Other Wes Moore". Fmr. Special Assistant to Secretary of State Rice. Fmr Director of Information Operations, 82nd Airborne Division, US Army, Afghanistan 2005-2006.

Nader Mousavizadeh– CEO of Oxford Analytica.

Luke Muehlhauser– Exec Director, Singularity University.

*Matt Mullenweg *– Founder, Wordpress.

Roger Myerson-- Prof of Economics, U of Chicago. 2007 winner of Nobel Prize in Economics.

Scott Nathan– Partner, Baupost Group.

Meghan O'Sullivan-- Professor, Harvard Kennedy School of Govt. Fmr Deputy National Security Advisor for Iraq and Afghanistan, President George W. Bush. Mbr, Trilateral Commission.

*Chamath **Palihapitiya*– CEO, Social+Capital. fmr VP Growth, Mobile, and International at Facebook. Fmr GM of AIM at AOL. Boards: SecondMarket, FixYa, Lemon, Integrated Plasmonics. Co-Owner, Golden State Warriors.

*Eli **Pariser**–*Fmr President, MoveOn.Cofndr, Avaaz.org. Boards: MoveOn, Avaaz, New Organizing Institute and Simon's Rock College.

Mark Penn– Corp VP of Strategic Projects (reports to the CEO), Microsoft. Fmr CEO, Burson-Marsteller. President, of polling firm Penn, Schoen and BerlandAssociates. Fmr Chief Strategist, Hillary Clinton for President 2008. Author, Microtrends. Fmr pollster to President Clinton. Fmr pollster to Prime Minister Tony Blair.

Lois Quam– Executive Director, Global Health Initiative – part of the State Department and she reports directly to Secretary Clinton. Fmr CEO of Public and Senior Markets, UnitedHealth Group ($30 billion division).

*Dan Rosensweig *– CEO, Chegg. Fmr CEO, Guitar Hero. Fmr COO, Yahoo.

Robert Rubin– Co-Chairman, Council on Foreign Relations. Fmr U.S. Secretary of the Treasury (1995-1999). Fmr Director, National Economic Council (1993-1995). Chm, Local Initiatives Support Corporation (LISC). Fmr Co-Chairman, Goldman Sachs.

Sal Russo– Founder, Tea Party Express. Partner, Russo Marsh.

Tod Sacerdoti– CEO, BrightRoll. Board: ReTargeter.

*Amy Salzhauer *– CEO, Ignition.

Cami Samuels– General Partner, Versant Ventures. Boards: Achaogen, APT Pharmaceuticals, Kythera

Biopharmaceuticals, Semprae Laboratories.

Ken Sawyer-- CEO, Saints Ventures (manages over $1 billion in capital). Selected to Forbes Midas List. Boards: Continuous Computing, HK Systems, Cleargauge, Travel Intelligence, Envivio, Alliance Consulting, Acsis and Laureate Pharmaceuticals.

Jessica Schell– EVP BD and Strategic Planning, Universal Pictures. Fmr SVP Digital Strategy and Business Development, NBC Universal. Board: World Wide Biggies.

*Barry Silbert *– CEO of SecondMarket.

Josh Silverman– President of US Consumer Services, American Express. Fmr CEO, Skype. Fmr CEO, Shopping.com. Fmr CEO and Fndr, eVite.

Sukhinder Singh Cassidy– Chm, JOYUS. Fmr CEO, Polyvore. Fmr President of Asia Pacific and Latin America, Google. Boards: TripAdvisor (TRIP) and Formspring.

Megan Smith– VP Business Development, Google. Fmr CEO, PlanetOut.

*Charles **Songhurst*-- GM and Head of Strategy and M&A, Microsoft. MD, Katana Capital.

Angelo Sotira– CEO, DeviantArt.

Bret Stephens-- Member of Editorial Board, Wall Street Journal. Main Foreign Affairs Columnist, Wall Street Journal. Fmr Editor-in-Chief, Jerusalem Post.

Simon Stevens– EVP, UnitedHealth Group. Fmr CEO, Ovations (revenues of $31 billion). Fmr Health Policy Director to British Prime Minister Tony Blair.

Henry Sweica– CEO, Talpion Fund Management. Fmr co-founder, Highbridge Capital Management.

Alexander Tamas- Partner, DST. Boards: Forticom, mail.ru

Peter Thiel-- CEO of Thiel Capital. Managing Director, Founders Fund. Fmr founder and CEO of PayPal. Boards: Facebook and Palantir.

*Steve Wayne *– CEO, Jensen Group.

Will Wechsler– Deputy Asst. Sec of Defense for Counternarcotics and Global Threats.

*Adam Weiss**– co-CEO, Scout Capital. *

*Katharine Weymouth**– Publisher, Washington Post.*

Michael Wolf– CEO, Activate. fmr President and COO, MTV Networks. Fmr Prtnr, McKinsey. Former Senior Partner, Booz Allen & Hamilton.

Paul Wolpe– Director, Center of Ethics. Prof of Bioethics, Emory. Sr Bioethicist, NASA. Co-Editor, American Journal of Bioethics.

Jed York– CEO of San Francisco 49ers.

Lauren Zalaznick– Chairman, Entertainment & Digital Networks and Integrated Media, NBCUniversal. She oversees Bravo, Oxygen Media, Style, PBS Sprout, Telemundo, iVillage, Swirl, Daily Candy, and Fandango.

*Eric Zinterhofer – *co-CEO, Searchlight Capital. Chm, Charter Communications. Fmr Sr Partner, Apollo Management. Boards: Central European Media Enterprises, Dish TV India.

Karl-Theodor zu Guttenberg– fmr Minister of Defense, Germany. Fmr Minister of Economics and Technology, Germany.

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From: jeffrey E. [jeevacation@gmail.com]
Sent: 7/4/2017 4:53:13 PM
To: Weingarten, Reid [redacted]
Subject: Re: Fw: The new iterations of Ghislaine Maxwell

Importance: High

On Tue, Jul 4, 2017 at 6:46 PM Weingarten, Reid [redacted] wrote:

Number?

Sent from my BlackBerry 10 smartphone.

From: [redacted]
Sent: Saturday, July 1, 2017 12:49 PM
To: [redacted]
Cc: Ainbanklaw Info; [redacted] Denyse Sabagh; [redacted] Michael Baxter; [redacted] Patrick M. Regan; [redacted]; Robert Barnett; Weingarten, Reid; [redacted] Ellen Kerns;
Subject: Re: The new iterations of Ghislaine Maxwell

We know of course that Saturdays are reserved for Matthew Horton.

On Saturday, July 1, 2017, 12:06:29 PM EDT, [redacted] wrote:

Rich Beckler,
Ken Adams,

Do you remember when I'd asked you what your daughters did for a living? Especially last night Mr. Beckler, as most Friday nights, no?

Yes, they are the new iterations of Ghislaine Maxwell; for you Richard Beckler, this originated from my being a former Stone Ridge classmate of his elder daughter Katie Beckler, and because he was on the Board of Stone Ridge during this period in time when my every family, friend, acquaintance and association was being contacted, bribed in one form or another, and turned against me (see below); as for Ken Adams, it stemmed from my having contacted him for representation in my 2011-filed case against IBM also during this period of time when my every communication were being tracked.

You both are interesting; you let us see what's to become of the Scalia 35 (see below; at bottom, Ghislaine Maxwell's Jeffrey Epstein in context.)

*

We start from this following precept: (the repeating 9/11s)

1. "Toward a New World Order" speech by Pres. George H.W. Bush – 9/11 (1990)

2. WTC Attack – 9/11 (2001)

3. BENGHAZI Attack – 9/11 (2012)

But you have to remember that H. W. Bush was planted:

AUTHOR PETER DALE SCOTT: Sometimes you have little deep events that most people don't even notice. One of those would be the Halloween Massacre. The older people remember the Saturday Night Massacre which happened under Nixon. I'm talking about the Halloween Massacre of October 31, 1975, and probably people watching this show have never heard of it.

That was under Ford, and Ford may have condoned it because it was trying to help restore his popularity. He was going way down in the polls. But it was a very important series of events all on the same night. The head of the CIA was fired, William Colby, replaced by a relatively unknown man called George H. W. Bush who then went on to authorize something that Colby had refused to authorize - the Team B report - the Team B to recalculate the Soviet threat and it was pre-determined. They were going to find that it was much bigger than the professionals angled like Raymond [inaudible] that I mentioned.

They said Russia is less of a threat now than it used to be. Well, that was terrible news for the industrial complex so the Team B came in and said oh, no, no, no, it's much more of a threat than it used to be, and that's why we got this huge military build-up. It started actually under Carter but we think of it as the Reagan build-up, and that of course is a major factor in having ended the Soviet Union because the Soviet Union tried to match it with a weaker economy. And that arms race which was not about threats but was about fighting economic war, that was an arms race which you could say that the Soviet Union lost because they couldn't keep it up. Their economy went more and more downhill because they were deflecting resources away from vital domestic functions. But really I'm trying to talk here about the Halloween Massacre...

Just the change in the CIA was a major historical event but it wasn't very visible. The second thing that happened was they fired Jim Schlesinger as Secretary of Defense... It was being done by [President Ford's] Chief of Staff and his assistant who are two names barely known then but quite famous since. Chief of staff was Donald Rumsfeld and the assistant was Dick Cheney. And that was the first real intrusion of the Rumsfeld-Cheney team into American politics. And they became the real heart of what I consider the Deep State in the 1980s when they were planning for Continuity of Government which was a plan for emergency rules like warrantless surveillance and warrantless detention and the militarization of homeland security. All those things were planned all through the '80s - COG planning by Donald Rumsfeld and Dick Cheney. Even when Rumsfeld wasn't in the government, he was authorized by Reagan to do this planning.

And why is that important to our history? Because in 2001, these two men were now in the government - Vice President and Secretary of Defense - the two top people in Washington on September the 11th, 2001 when Bush was down in Florida - George W. Bush - and what did they do on that day? They implemented the plans they had been planning for 20 years. Another major event in American history but it's not usually told that way.

We implemented - it's in the 9/11 Commission Report that COG plans were implemented on that day. This is a huge change in our country. We now have an ARMY command, NORTHCOM, to take charge of America - North America, the way SOUTHCOM is in charge of South America and CENTCOM is in charge of Central Asia.

This used to be illegal... We had the posse comitatus acts which said, yes, if there's a real emergency you could call up the ARMY to deal with the emergency, but you cannot do it on a permanent basis but we now do do it on a permanent basis. We haven't even bothered to repeal the posse comitatus. We are in a state of emergency that was declared on September the 14th, 2001. And it's still enforced. It has to be renewed every year. Obama did it every year just as George Bush renewed it every year.

What are the roots of this? Well there are the legitimate roots that go back to fear of an atomic decapitation of the government back in the Truman era, so legitimate COG planning goes back to Truman and Eisenhower, but the illegitimate use of COG to deal with any emergnecy you like, that goes to the Reagan administration and it really goes back to the [Halloween] Massacre where Rumsfeld and Cheney put their thumbprint on American politics for the first time.

-- interview of Peter Dale Scott, @ min. 32:00,
https://www.youtube.com/watch?v=hNqDAYWYFuQ&t=2433s

This all suggests that the start of the 9/11 agenda pre-dated him as well. I see now that there was a seemingly relevant 1990 event as well. "On September 11, 1970 -- a date that only took on haunting overtones with the attacks on New York and Washington in 2001 -- Nixon became the first U.S. president to try to protect air travelers from extremists who sensed gaping vulnerabilities in security for commercial airliners, issuing a statement listing a string of measures including the introduction of 100 air marshals on U.S. planes. "Most countries, including the United States, found effective means of dealing with piracy on the high seas a century and a half ago," Nixon said. "We can -- and we will -- deal effectively with piracy in the skies today."
The President had been jolted into action by the simultaneous hijackings of planes in Europe headed to the United States. Jets belonging to TWA, Pan Am and Swissair were seized by the Popular Front for the Liberation of Palestine. The group also attempted to hijack a jet over London belonging to the Israeli airline El Al but was thwarted by security guards on board.
The Pan Am seizure ended quickly, but the passengers on the TWA and Swissair jets were diverted to a British air base in Jordan and the drama only ended after days of tense diplomacy, when the hostages were all released in a deal in which the Swiss, German, British and Israeli governments let Palestinian prisoners go." (http://www.cnn.com/2015/07/27/politics/terrorism-1970s-richard-nixon/index.html)

This 9/11 response sounds quite normal of course. But fast forward and the two secret service individuals chosen for an April 2001 interview by a PWC staff member on behalf of what becomthe IBM Center for the Business of Government were (1) Steve Colo who happened to be the head of the division at SAIC that falsely labeled me a threat and added my name to some sort of Do Not Admit list at the end of a 5 month temp assignment in 2005 into early 2006. The consequence of the SAIC designation for me was the following:

(I write) "The SAIC designation took advantage of a devilish stratagem in which as a national security employee (having filed out a SF-86 form, governed actually by the GSA - https://www.gsa.gov/portal/forms/download/116390 - for government clearance) working a designated contract in a classified facility, being designated a disturbance/dissident/threat to operations, makes one, in turn, a threat to national security - with all the surveillance/targeting that enables." In essence I was made an enemy of the State and was tracked, my family and friends turned, my opportunities seized to include the opportunity to rear family as demonstrated especially in the 2007 sabotage of my third trimester pregnancy and then the targeting and eventual capture of children I used to babysit - in 2011, they were predominantly tweens - to be used for sexual blackmail and other forms of leverage. The reason for the use of children in this barbaric way was to

expend "ops" that were already in effect and had been used to control many of the politicians that have been allowed to rise to the top (see info on the Franklin Scandal for example), and similarly according to the laws of compromise, the following which has been recently developing into highly coordinated murder "ops":

(I write) "The progress that was made from the absorbing of my (small) network (and this through sources and methods - money and other pleasureful compensations given to those willing to participate in and/or coordinate violence against me and my loved ones to include children leading only to now their enabled targeting and the absorbing of whatever may be their networks - well, you see below (and this only the very tip of the iceberg) how many people they've been able to engulf and what advances have been made by the quite elaborate criminal class employing these tactics; and one also begins to better understand the events surrounding Justice Scalia's passing and what's to come for the 35 guests in Scalia's private party. As for Scalia's passing, it was decidedly suspicious as noted by William Ritchie: (The Washington Post prints) "As a former homicide commander, I am stunned that no autopsy was ordered for Justice Scalia," William O. Ritchie, former head of criminal investigations for D.C. police, wrote in a post on Facebook on Sunday... Ritchie also raised questions about the marshals' actions: "How can the Marshal say, without a thorough post mortem, that he was not injected with an illegal substance that would simulate a heart attack… Did the US Marshal check for petechial hemorrhage in his eyes or under his lips that would have suggested suffocation? Did the US Marshal smell his breath for any unusual odor that might suggest poisoning? My gut tells me there is something fishy going on in Texas."

As for SAIC, the following also pertains:

(I write) "If you first see SAIC as what's called a systems integrator (author Tim Shorrock's phrase), and also the formerly married Bud and Sue Horton and their two grown sons Matthew Horton and Ben Lanier as aids of an implementation, you can better see the bigger picture:

(1) Sue Horton left IBM in early 2007-ish for an executive position at Tetra Tech which soon entered into joint venture with SAIC (Sue's employer prior to IBM, btw) on an enormous (billion dollar) 2011 Hillary Clinton State Department award (http://www.prnewswire.com/…/saic-tetra-tech-joint-venture-a…);

(2) that Bud Horton left IBM in early 2009-ish for an executive position at Accenture which soon thereafter entered into joint venture with SAIC spin-off Leidos, and Cerner, on an enormous (billion dollar) 2015 DoD award (http://www.healthcareitnews.com/…/dod-names-ehr-contract-wi…);

(3) that the Sue Horton contract was used to grow and fortify the Afghan heroin trade (as well as corrupt law enforcement) although the stated intention was of course the opposite... ("[SAIC and Tetra Tech's] joint venture, Integrated Justice Systems International, LLC (IJSI), has been awarded a contract to provide worldwide civilian police and criminal justice assistance to the U.S. Department of State's Bureau of International Narcotics and Law Enforcement Affairs (INL)... [specifically} to provide INL with program management, criminal justice, and life and mission support to countries emerging from conflict or otherwise facing instability challenges. Under this new contract, IJSI will provide technical assistance, training, logistics and infrastructure services to support the Department of State's efforts to strengthen criminal justice systems in select partner countries.")... yet, just months shy of contract end, the NY Times reported: "Tasked With Combating Opium, Afghan Officials Profit From It;" "Penetrating Every Stage of Afghan Opium Chain, Taliban become a Cartel;" and "Corrupt Combatants Fight for Control of Lucrative Afghan Drug Trade;" see also here an overview of the growth of Afghan opium production from the start of the US occupation (2001) to the present, and especially from contract start (2011) to end (2016): http://www.globalresearch.ca/the-spoils-of-war-afghanist…/91;

(4) and that the award Bud Horton helped secure just as Sue's contract was coming to an end was not only born from what looks like Franklin Scandal compromises, but it is this contract that seems intent on implementing bioterrorism as the new form of explosive terrorism."

(Note that both members of this family were awarded BILLION dollar contracts; that's quite exceptional, no?)

As for terrorism as an US industry, it's hardly better seen than through the following which is information of course we all know:

We note that in-between Bush #41's 9/11/1990 speech(with Dick Cheney as his Secretary of Defense) and the 9/11/2001 attack on the WTC were little more than Clinton's 8 years in the White House. We look also to The American Deep State by Peter Dale Scott for evidence of ties between the actions of the Clinton administration and (1) the 1993 attack on the WTC and (2) the 1998 attack on the US embassy in Nairobi, Kenya which demonstrate that the Clinton administration in no uncertain terms sponsored terrorism:

(Writes Scott) "The homicidal crime suggested by Fenton's meticulous research is one both difficult and painful to contemplate. It has to be considered in the light of the earlier instances of protection we have surveyed:

1. the protection given to Salameh and Abouhalima in the 1990 Kahane murder, leaving them free to participate in the 1993 World Trade Center bombing;

2. the failure for two or three years to process Ali Mohamed's documents seized in 1990, which could have prevented the 1993 World Trade Center bombing;

3. the release of Ali Mohamed from Royal Canadian Mounted Police detention in 1993, leaving him free to participate in the 1998 Nairobi Embassy bombing;

4. the treatment of Ali Mohamed as an "unindicted coconspirator" in the 1993 WTC bombing case and Landmarks case, leaving him free to participate in the 1998 Nairobi Embassy bombing.

(pp. 76-77, The American Deep State)

Scott had earlier examined these attacks in especial connection to the September 11, 2001 attack on the WTC:

(Writes Scott) "For indeed it is certain that on various occasions U.S. agencies have intervened, letting al-Qaeda terrorists proceed with their plots. This alarming statement will be dismissed by some as "conspiracy theory." Yet in this chapter, I will show that this claim doesn't to arise from theory, but from facts that are true, even though they have been systemically suppressed or under-reported in the American mainstream media. I am describing a phenomenon that occurred not just once, but repeatedly, almost predictably. We shall see that, among the al-Qaeda terrorists who were first protected and then continued their activities were the following:

1. Ali Mohamed, identified in the 9/11 Commission Report as the leader of the 1998 Nairobi Embassy bombing;

2. Mohammed Jamal Khalife, Osama bin Laden's close friend and, while in the Philippines, financier of both Ramzi Yousef (principal architect of the first World Trade Center [WTC] attack) and his uncle

Khalid Sheikh Mohammed;

3. Khalid Sheikh Mohammed, identified in the 9/11 Commission Report as "the principal architect of the 9/11 attacks";

4. Khalid al-Mihdhar and Nawaf al-Hazmi, two of the alleged 9/11 hijackers, whose presence in the United States was concealed from the FBI by CIA officers for months before 9/11.

It might sound from these citations that the 9/11 Commission marked a new stage in the U.S. treatment of these terrorists, and that the report now exposed those terrorists who in the past had been protected. On the contrary, a principal purpose of my chapter is to show that

1. one purpose of protecting these individuals had been to protect a valued intelligence connection (the "al-Qaeda connection," if you will);
2. one major intention of the 9/11 Commission Report was to continue protecting this connection;
3. those on the 9/11 Commission staff who were charged with this protection included at least one commission member (Jamie Gorelick), one staff member (Dietrich Snell), and one important witness (Patrick Fitzgerald) who earlier had figured among the terrorists' protectors.

In the course of writing this chapter [Scott continues], I came to another disturbing conclusion I had not anticipated. This is that a central feature of the protection has been to defend the 9/11 Commission's false picture of al-Qaeda as an example of non-state terrorism, ignoring not just the CIA but also the royal families of Saudi Arabia and Qatar. In reality, as I shall show, royal family protection from Qatar and Saudi Arabia (concealed by the 9/11 Commission) was repeatedly given to key figures like Khalid Sheikh Mohammed, the alleged "principal architect of the 9/11 attacks." The establishment claims that the wars fought by America in Asia since 9/11 have been part of a global "war on terror." But this "war on terror" has been fought in alliance with Saudi Arabia, Qatar, and Pakistan - precisely the principal political and financial backers of the al-Qaedist networks the United States has supposedly been fighting. Meanwhile the most authentic opponents in the region of these Sunni al-Qaedists - the governments of Iraq, Libya, Syria, and Iran - have found themselves overthrown (in the case of Iraq and Libya), subverted with U.S. support (in the case of Syria), or sanctioned and threatened as part of an "axis of evil" (in the case of Iran). We should not forget that, just one day after 9/11, "Rumsfeld was talking about broadening the objectives of our response and 'getting Iraq.'"

(pp. 44-45, The American Deep State)

Clinton's daughter is now poised to work global health initiatives which I would suggest is little more than a cover for on-going terrorism "ops".

To return to Steve Colo - in the interview he speaks of a partnership between the Secret Service, the FBI, and South Carolina's SLED (State Law Enforcement Division) to open a Computer Crime Center. Bud Horton (mentioned above) (long-affiliated with IT Security; his title at Accenture was Chief technology officer of it's cyber security practice) happened to have just moved to South Carolina from Loudoun County after being implicated in a continuing child sex scandal (see details below). Further, cyber-crime just so happens to be another of the arenas in which our Intelligence Community coordinates with the Russians: "The US cooperates with the FSB and Russia's interior ministry on counter-terrorism, organized crime, bio-terrorism, and cyber-crime." -- p. 243, Expelled: A Journalist's Descent into the Russian Mafia State, by Luke Harding) Most would interpret this quote to suggest that the nations work together to prevent these various threats. The reality is more the opposite; trust me when I say that the US doesn't work "ops" alone - the 2005 London Bombings is one notable example of a instance in which the US coordinated with also British intelligence in the

perpetration of an attack.) I just tweeted this morning actually the following in regards to US coordinations with the Russians: "One must know a renowned Rus mafiaso was granted entry https://en.wikipedia.org/wiki/Vyacheslav_Ivankov#Moving_to_the_United_States … be4 the real story of today's US-Rus relations is slowly known" in response to the following comment @turndeaux: Peter Dale Scott, who writes about the Deep State, says Russia issue is "a bona fide security issue, not a diversion".

About Bud Horton and the Loudoun County matter - in attempts to make a long story short, the following email chain:

On Monday, June 26, 2017 10:57 AM, [redacted] wrote:

Sheriff Chapman,
Loudoun Count, VA

Did you ever consider that Loudoun was a target? That your community was induced to walk it's own children down the plank as compensation for what Loudoun had done to the young Dima Yakovlev? Because now child exploitation is deeply embedded within your community with your own people (your own police, your own prosecutors, your own public defenders and private attorneys) protecting this very system that will be used to take the futures of your Loudoun children (see more of the details below). Is it possible that that's how this happened, and you saw it not unfolding before your eyes? Or was it simply money and just another good enough justification?

Forwarded Message

On Monday, June 26, 2017 10:24 AM, [redacted] wrote:

Changeis,

You reported in May of 2014 that you hired Bob Richel formerly of the DEA as Vice President of Corporate Development. In an April 2014 interview by the Loudoun County Police (those in the mouth of the lion but not quite aware of it yet but to have foreseen the ways in which the 2008 death of the Russian born 21 month-old Dima Yakovlev (renamed Chase Harrison by his Purcellville, VA adoptive parents) would have been used as "justification" for a (quite profitable) counter-offensive...) of Henry "Bud" Horton (characterized by Loudoun County as a "victim" of the recent "False statement to Law Enforcement Officer (LEO)" of him sexually exploiting the 15 year-old Anjulee Gunther), Henry "Bud" Horton named Bob Rachel as one of the DEA guys he used to work with. This takes on unusual significance in light of the below, no?

(How lovely, by the way, this following information and the ways in which it helps us understand many of the hidden influences: "Halliburton is also involved with the Russian mob. They're got sort of two things going on. One is oil and the other is drug trafficking. Halliburton is a story all by itself." (says Stan Goff, http://narconews.com/goffmccormick1.html))

On Saturday, June 24, 2017 2:43 PM, [redacted] wrote:

Mr. Satz,
State's Attorney, Broward County, Fl

I'm forwarding the below information as it pertains to Mrs. Lesley Simms and more importantly the ones with whom she continues to coordinate.

As you may know, she was once close with an individual named Matthew Horton with whom she attended George Mason University, and through Matthew, Ms. Simms became well-acquainted with Matthew's parents Henry "Bud" Horton and Sue Popovich Horton who helped secure her a position at IBM upon her graduation from GMU. Both of these latter individuals (Bud and Sue Horton) were involved in the 2007 murder of my son, and they in collusion with their son Matthew continue in the exploitation of children Anjulee and Xian Gunther. The powers that be intend now for these children to (continue to) follow in the footsteps of Ms. Simms, and to that end, I would advise that you become acquainted with (1) the ways in which Ms. Simms subsidized her law school education and off course (2) her current and related endeavors especially as they relate to drug trafficking and terror financing (see below email to Mr. Martin of the St. Augustine Record).

On Friday, June 23, 2017 8:36 AM, [redacted] wrote:

Mr. Martin,
St. Augustine Record

Quite an interesting article about the litigation between Deputy Banks and Rusty Rogers (see: Deputy Banks' attorney claims FDLE agent's credibility 'destroyed') It must also be explored, of course, that Officers Rodgers was once well respected for his investigation and exposure of a terrorist financing network that permeated the sunny state of Florida - (the NY Times reports) "Agent Rodgers joined the state's elite investigative unit, the Florida Department of Law Enforcement, where he quickly earned agent-of-the-year honors — and a meeting with the governor — for helping dismantle a terrorist financing network that stretched from Florida to the Middle East" - and that terrorism is very much a well-protected U.S. industry (see below).

God forbid some poor should get away with disrupting the delicate state of secreted operations; as you yourself report, "As written in [Plaintiff Banks'] motion: "Defendant Rodgers' false, misleading and inconsistent testimony throughout the discovery process is so pervasive and extreme, and involves so many material issues, it has destroyed Defendant's credibility on all issues..." And here we see the "whole-of-government" attempts to restore balance.

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As for the second Secret Service agent interviewed by the IBM Center for the Business of Government, his name is Dana Brown. He just so happened to have filled out his career with the Federal Air Marshall Service (October 2003-August 2008 as Director/Chief of Staff) followed by the TSA (March 2006-January 2009 as Asst. Administrator-Law Enforcement/Integrity Officer) states his LinkedIn profile. That he worked his way around to that which was largely put in place by the 1970 9/11 mini-event seems to me rather significant although I don't see all the details yet. I also don't yet see exactly who it was that birthed this lengthy 9/11 initiative we're suffering. It seems clear, however, that it was birthed prior to 1970.

The initiative has adjusted in some ways over time, but homage to 9/11 remains strong. Certain of the people deeply involved in these manipulations thought it was kismet that an individual well-suited to head the newly ordained Department of Homeland Security (that as we all know was the result of legislation rushed through Congress in the aftermath of the 9/11 (2001) attack) was born on the magical September 11th (this is Jeh Johnson); similarly, it is again being deemed a sign that the new Director of the National Science Foundation (NSF) (chosen and positioned as she was) is first-named France (last name Cordova) and that this name so perfectly relates to US intentions to use the NSF to forward "ops" that will solidify a US-France working relationship in the same way the

2005 London Bombings helped solidify the US-British working relationship. These France going-ons are in higher gear (I've noticed) since Macron was elected but it was prepped for long ago. I was working for IBM under IBM project manager Cathie Skoog at the NSF when my third trimester pregnancy was sabotaged. The story of this sabotage and what followed is (briefly) this:

I've long-alleged that John and Avery Gunther (whose children I used to babysit) agreed to a quid pro quo exchange of financial compensation for help destroying my credibility on behalf of IBM against whom I'd filed a 2010 EEOC (Equal Employment Opportunity Commission) charge and a subsequent May 2011 civil suit.

Per the May 11, 2011 Complaint, McGuire v. John and Avery Gunther:

3. On April 6, 2011 Mr. and Mrs Gunther, with uncontrolled greed and total disregard for the rights and feelings of Ms. Nadine McGuire as well as those of their children, AFG and XWG, maliciously and with ill-intent, wrongfully completed and executed a Complaint and Motion for Preliminary Injunction requesting formal protection against Ms. Nadine McGuire.

4. Over the course of the previous few months, Mr. and Mrs. Gunther, colluding with persons against whom Ms. Nadine McGuire is currently furthering litigation, including but not limited to plaintiff's mother, Pauline Scala McGuire, and from whom they received and/or have been promised to receive monetary incentives, hid their relationships with said individuals, further lied about having those relationships in direct conversation with Ms. Nadine McGuire and Court testimony on May 4, 2011, and wrongfully completed and executed a Complaint and Motion for Preliminary Injunction against Ms. Nadine McGuire in cooperation and collaboration with said persons, resulting in the issuance of a Temporary Restraining Order against Ms. Nadine McGuire issued on April 6, 2011.

- Initial Complaint, 5/11/11, McGuire v. John and Avery Gunther, Case No.:2011 CA 003703 B, DC Superior Court, Judge Gregory Jackson presiding

In regards to the suit against IBM (McGuire v. IBM, 1:11CV528, US District Court of Virginia), the only suit in which Pauline Scala McGuire was listed as a defendant, the most important claim was one of “assault” that led to the 2007 death of my son. Per the filing:

Plaintiff, Grace Nadine McGuire, realleges the allegations of paragraphs 1-65 hereof as if fully set forth within and further alleges:

66. Defendant Palmisano's conduct in ascertaining the drug that was used on the plaintiff to end her pregnancy and take the life of her child on April 22, 2007, constitutes an intentional touching of the plaintiff by defendant Palmisano, and was undertaken deliberately and with actual malice towards the plaintiff and her unborn child.

67. Defendant Skoog, Susan Horton and Scala's conduct in coordinating the circumstances, creating physical proximity and the administering of the drug to the plaintiff that ended her pregnancy and took the life of her child on April 22, 2007 constituted an intentional touching of the plaintiff by said defendants, and was undertaken deliberately and with actual malice towards the plaintiff and her unborn child.

... 69. As the direct and proximate result of defendant Palmisano, Skoog, Susan Horton, and Scala's conduct, the plaintiff suffered a severe placental abruption, which terminated her pregnancy and ended the life of her unborn child, causing the plaintiff to suffer damages including but not limited to the loss of her child, loss of affection, grief, sorrow, extreme mental torment and emotional distress.

- Initial Complaint, filed 5/16/11, McGuire v. IBM, et al, Case No.: 1:11CV528, US District Court of Virginia - Eastern Division, Alexandria, Judge Leonie Brinkema presiding

This is to say that John and Avery Gunther helped IBM defend against an allegation of murder, and in this way they are accomplices to a cover-up. This is also to say that the characterization provided by John and Avery Gunther in their April 2011 Superior Court filing for a Protection Order against me and their admissions in this filing of having provided derogatory information to various persons and/or entities in the DC area to include school administrators, psychologists, and law enforcement, were more to harm me, especially in my chances to hold IBM accountable, than to protect either themselves or children Anjulee and Xian Gunther.

I also long-allege that the relationship that developed from this initial quid pro quo led to John and Avery Gunther being similarly compensated for what turned into the sexual exploitation of their two daughters. For more on child sexual exploitation for the sake of personal and professional leverage, see especially the following:

Nick Bryant | The Franklin Scandal & The Elite's Pedophilia Cover Up,
https://www.youtube.com/watch?v=68gvGGPjm0o&t=978s

That the NSF won't acknowledge the abuse, and won't respond even to my FOIA requests, and otherwise has gone to extents to protect Cathie Skoog and her co-conspirators at IBM and otherwise is all that was needed to have adequately turned the organization towards the interests of the Deep State. Now it is simply a matter of the Deep State continuing to put the NSF to use.

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Jeffrey Epstein in context:

(As sent to the Wash Post)

I send you this in response to the recent column entitled Believe in the Process by Kenneth Starr. Perhaps rethink any public affiliation with Ken Starr; although his demeanor on paper is undoubtably consoling, it is also a bit intoxifying when it would be best now if we keep our wits about us, no?

I say this from the following perspective - Ken Starr of the Starr Report, attorney for (1) Erik Prince of Blackwater and (2) convicted pedophile Jeffrey Epstein in context:

The Starr Report buried behind salacious detail of the Lewinsky affair almost nothing of Whitewater, Travelgate, or otherwise what many consider the murder of Vince Foster (Foster, albeit the subject of a different investigation was also under the purview of attorney Starr and formal investigation of the results of Starr's investigation were drowned out by the details of the Lewinsky affair.) This is a bit strange considering the Lewinsky affair was a moral failing and not an actionable criminal one as would have been the others had any proof surfaced.

Starr later defended Blackwater against wrongful deaths suit initiated by the families of the 2004 Fallujah Ambush victims - "In October 2006, Blackwater hired one of the nation's heaviest-hitting lawyers to represent it - Kenneth Starr, the independent counsel in the 1999 impeachment of President Bill Clinton over the Monica Lewinsky sex scandal... Starr and his colleagues argued that Blackwater was "constitutionally immune" from such lawsuits and said that if the Fallujah case were allowed to proceed, "Blackwater will suffer irreparable harm." In the eighteen-page petition to the Supreme Court, Blackwater argued that there are no other such lawsuits against private

military/security companies in state courts "because the comprehensive regulatory scheme enacted by Congress and the President grant military contractors like Blackwater immunity from state-court litigation." (pp. 234-235, Blackwater). (Author Ken Davis writes) "The four men had spent the night before they set off at marine base Camp Fallujah. But the men kept their distance from the leathernecks. Had they spoken to the marines, the Blackwater team might have learned that the Americans were already in the midst of a major offensive meant to assert control over the increasingly restive city, where elements of the radical Islamist movement and remnants of Saddam's army were beginning to aggressively strike back. at the American occupation" (p. 306, The Hidden History of American at War), and perhaps this is the only thing that makes sense of the fact that "Under the terms of its contract, Blackwater was supposed to supply these convoy security missions with two SUVs, each carrying three guards per vehicle; a driver, one man riding shotgun, and a third man in back with a heavy machine gun. Instead, the foursome set out that morning with just two men per car, each vehicle missing their rear gunner. The SUVs were only outfitted with a steel plate as extra armor. And the men had not been given maps." (p. 305).

Starr went on to defend Jeffrey Epstein abasing allegations of child sex trafficking - "Along with a dream team of attorneys that included Gerald Lefcourt, Roy Black, and Ken Starr, [Alan Dershowitz] was successful in getting federal investigators not to charge Epstein with moving his victims across state lines and other associated crimes. The federal non-prosecution agreement Epstein's legal team negotiated with the U.S. Attorney for the Southern District of Florida immunized all named and unnamed "potential co-conspirators" in Epstein's child trafficking network, which includes those who allegedly procured minors for Epstein and also any powerbrokers who may have molested them" (-http://gawker.com/flight-logs-put-clinton-dershowitz-on-ped…). Otherwise, Epstein's eventual 18 month sentence by the state of Florida was exceptionally light under the circumstances to include the number of victims who came forward with testimony. This is best understood in the context of children being used as a means to government-sponsored sexual blackmail and other forms of leverage.

See here Erik Prince in greater context: (the similarities between him and once (secretly) favored child Bin Laden)

The coordinations among global intelligence to make rather than eliminate terror as seen thru "assets" bin Laden (as M. Noriega before him) & Erik Prince:

About BL: "Some CIA officers will later say that [BL] serves as a semi-official liaison between the GIP [Saudi intel.] and warlords like Sayyaf." (www.historycommons.org/entity.jsp?entity=ahmed_badeeb_1)

About EP: “Handcuffed by politics, the CIA had not been able to cultivate relationships with the key but messy leaders. Fortunately, Blackwater had no such political restrictions.” (p. 54, Civilian Warriors by E. Prince)

We see also:

About BL: "Bin Laden established camps inside Khyber Pakhtunkhwa in Pakistan and trained volunteers from across the Muslim world to fight against the Soviet-backed regime, the Democratic Republic of Afghanistan” (Wikipedia)

About EP: "In his autobiography, he states that during the Yugoslav Wars in the early 1990s, he realized the need for private training facilities for special operations… Prince moved to Virginia

Beach and personally financed the formation of Blackwater Worldwide in 1997. He bought 6,000 acres (24 km2) of the Great Dismal Swamp of North Carolina and set up a school for special operations" (Wikipedia)

Erik Prince is (becoming) no less an Amer. intelligence success story than bin Laden (in support of Terrorism as Geostrategy & a New World Order - see below). In short: (we note the repeating 9/11s, every 11 years): "Toward a NWO" speech by Bush #41 - Sept. 11 ('90); The WTC - Sept. 11 ('01); Benghazi - Sept. 11 ('12). (There is rhy. & reason also 2 the rise of ISIS.)

***

About training camps:

I watched so to speak the creating of little torture pockets around the world as justified by Obama's desire to close Gitmo. The White House reports (2/23/16): "We'll continue to securely and responsibly transfer to other countries the 35 detainees already approved for transfer. This process involves extensive and careful coordination across our federal government to ensure that our national security interests are met when an individual is transferred to another country. We insist, for example, that foreign countries institute strong security measures." But are these not just the seeds of new training camps (growing concentrated and lauded violent temperaments) & was that not someone's exact intent?

In real-time (and as perpetrated on captured children):

3/19/14, sent to the now defunct FB page of D. Cheney:
Dick Cheney,

I wonder if it's possible that there is coordination with other countries concerning enhanced interrogation techniques, in the form of training perhaps?

Specifically, here in the United States, my sense is that there may be the use of vulnerable populations, with the intension to gain favor with and/or intimidate others, especially members of the international community.

*

And:

On Saturday, June 21, 2014 6:37 AM, [redacted] wrote:
To: [redacted]

Deputy Lyddy,

Her energy is very weak. She is physically exhausted, VERY sleep deprived, and HUNGRY.

[These were continuing experimentations in reversed-engineered SERE; the agreed upon techniques, taken from various regions of the world to be distributed to the various regions of the world, had to be deemed not torture and this is where organizations like the APA stepped in, then (during the Bush administration), and afterwards. See here for example: "And I think, you know, what's really important in the debate going forward among psychologists is the extent to which psychologists loaned their names and loaned their credentials and their Ph.D.s to this kind of activity and essentially were used by the Bush administration to provide a kind of "get out of jail free" card for

the people who were, you know, doing these interrogations, because the logic, which I think Mark had mentioned, is, you know, this circular logic. So long as there are trained psychologists from the SERE program who are on site at these interrogations who are saying that these detainees can withstand this treatment, are not being harmed psychologically, then it's not torture. So, you know, you've got this sort of [inaudible] tortured — tortured logic, which is the phrase that has come up, but it's this sort of self-justifying loop in which professionals are loaning their credentials to this kind of activity. And you see the same thing in the Office of Legal Counsel, where you have, you know, lawyers loaning their credentials to approving what are clear violations of the Geneva Conventions." (https://www.democracynow.org/2009/4/21/the_story_of_mitchell_jessen_associates)]

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DAVID SCHOEN

CRIMINAL LAW: CRIME VICTIMS' RIGHTS DURING CRIMINAL INVESTIGATIONS? APPLYING THE CRIME VICTIMS' RIGHTS ACT BEFORE CRIMINAL CHARGES ARE FILED

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Highlight

This Article addresses whether crime victims should have rights during criminal investigations, using the Crime Victims' Rights Act (***CVRA***) as the focal point for our discussion. This is a critical issue, as many criminal cases may never proceed to formal charging. If crime victims have no rights during criminal investigations, then many crime victims will never have any rights at all.

The issue of whether crime victims have rights in the criminal justice process recently came to a head when the Justice Department released a memorandum contending that the ***CVRA*** does not extend crime victims any rights until prosecutors choose to file formal criminal charges. This led the ***CVRA***'s Senate cosponsor, then-Senator Jon Kyl, to fire off an angry letter to the Justice Department attacking its position. In our Article, we side with the Act's cosponsor. We believe that, properly understood, the ***CVRA*** does extend crime victims' rights during criminal investigations.

Our Article proceeds in four parts. First, it highlights the importance of applying the Act before the formal filing of charges by illustrating how dozens of victims in a notorious federal sex abuse case were deprived of the ability to participate meaningfully in the criminal process when federal prosecutors narrowly interpreted their responsibilities under the Act. Second, the Article reviews the purpose, text, structure, and history of the ***CVRA***, concluding that they all support the conclusion that crime victims have rights during criminal investigations. Third, our Article critiques the Department's memorandum, demonstrating that the Department's analysis is unpersuasive. Fourth and finally, the Article provides a specific approach for determining when rights should attach - specifically when federal law enforcement agencies have identified a crime with sufficient precision to send a "target" letter to a criminal defendant. We also observe that federal and state prosecutors have already accorded rights to victims before formally filing charges, which further undermines the Department's overly narrow construction of the Act.

Text

DAVID SCHOEN

[*61]

Introduction

In recent years, federal and state enactments have given crime victims extensive rights to participate in criminal cases. Many of these rights apply only after the filing of criminal charges, such as the victim's right to be heard during court proceedings. A crime victim's right to deliver an impact statement at sentencing, for instance, can only be exercised after a prosecutor has filed charges against a defendant and obtained a conviction. Other rights, however, can apply even before the formal filing of charges. As one example, the Crime Victims' Rights Act (***CVRA***) [1] extends to federal crime victims the right to "confer" with prosecutors. But can victims exercise this right before charges have been filed?

This question has tremendous practical importance. In many cases, prosecutors negotiate pleas well before any charges are ever drafted. If crime victims' rights enactments do not extend rights to victims until the formal filing of charges, then crime victims can be effectively excluded from the plea bargaining process. Yet the exclusion of victims in early stages of a criminal case affects more than just the content of a plea deal. Crime victims will also lose other important rights in the process if the formal filing of charges is the necessary trigger for those rights. If, for example, prosecutors work out a nonprosecution agreement with an offender, they need not notify his victims of what they are doing or of the fact that potential charges will never be filed.

The issue of pre-charging rights has most prominently surfaced in connection with federal cases. In 2010, the Department of Justice's Office of Legal Counsel (OLC) weighed in on the issue and released a legal opinion arguing that victims of federal crimes have no ***CVRA*** rights during a federal criminal investigation. [2] The Justice Department took the position that rights under the ***CVRA*** do not apply until prosecutors formally initiate criminal proceedings by filing a complaint, information, or indictment. The Department claims to find support for that limiting interpretation of the statute in its plain language and legislative history.

Shortly after the Department released its opinion, one of the ***CVRA***'s congressional sponsors, then-Senator Jon Kyl, sent a letter to Attorney General Eric Holder strenuously objecting to the Department's conclusions. Senator Kyl directly stated his view that "when Congress enacted the **[*62]** ***CVRA***, it intended to protect crime victims throughout the criminal justice process - from the investigative phases to the final conclusion of a case." [3] Senator Kyl contested the Department's analysis of the statute and, in particular, its use of statements from him during Congress's consideration of the ***CVRA***.

This Article sides with the ***CVRA***'s cosponsor and concludes that crime victims' ***CVRA*** rights attach before formal charging. Both the ***CVRA***'s plain language and its legislative history lead inexorably to this conclusion, as every court that has considered this issue has concluded. This Article also contends that, as a matter of sound public policy, crime victims should have rights before the formal filing of criminal charges.

This Article proceeds in four parts. Part I frames the issues under discussion by defending the importance of extending rights to crime victims during criminal investigations. Part I also provides background on victims' rights and gives a concrete illustration of a case in which the question of pre-charging rights for crime victims has arisen - specifically, the Jeffrey Epstein sex abuse case before a federal court in Florida. In that case, girls victimized by Epstein have argued that they should have been consulted about a federal nonprosecution agreement; Department attorneys have responded that because prosecutors never filed charges, government officials had no formal obligations to inform the girls.

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[1] Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, Pub. L. No. 108-405, ***118 Stat. 2260, 2261-65 (2004)*** (codified as amended at *18 U.S.C. § 3771* (2012) and *42 U.S.C. § 10603*(d)-(e) (2006)).

[2] The Availability of Crime Victims' Rights Under the Crime Victims' Rights Act of 2004, *35 Op. O.L.C. 1* (Dec. 17, 2010) [hereinafter OLC ***CVRA*** Rights Memo], available at *http://goo.gl/fHmCL4*.

[3] Letter from Jon Kyl, U.S. Sen., to Eric H. Holder, Jr., Att'y Gen. (June 6, 2011), reprinted in 157 Cong. Rec. S3608 (daily ed. June 8, 2011) (statement of Sen. Jon Kyl).

Part II reviews the ***CVRA***'s purpose, text, structure, and legislative history. This review establishes that the ***CVRA*** extends rights to crime victims before formal charges are filed.

Part III critiques OLC's position that the ***CVRA*** extends rights to victims only after prosecutors have lodged charges in court. The Department's proffered arguments do not withstand close scrutiny, particularly in light of the fact that the ***CVRA*** covers federal agencies involved in the "detection" and "investigation" of crime, [4] and specifically authorizes crime victims to file ***CVRA*** motions in situations where "no prosecution is underway." [5]

Part IV then proposes a specific approach for determining when crime victims' ***CVRA*** rights attach. This Part explains that the rights should attach when federal law enforcement or prosecuting agencies have identified a federal crime and a particular victim with sufficient precision that they would send a "target" letter to a criminal defendant in similar circumstances. If prosecutors have sufficient information to provide notice **[*63]** to a potential criminal of his rights, they can do the same for his victims. This Part also notes that the Department of Justice and state prosecutors already successfully provide rights to victims before charging. This successful experience strongly suggests that providing rights to victims early in the criminal justice process will not be unduly burdensome.

I. The Issue of Rights for Crime Victims During Criminal Investigations

To consider the question of whether victims should have rights during criminal investigations, some understanding of the underlying purposes of victims' rights enactments will be useful. These enactments are typically designed to make victims participants in all phases of the criminal justice process. [6] Congress drafted the ***CVRA***, for example, broadly to make crime victims participants in criminal cases. The Jeffrey Epstein sex abuse case demonstrates the importance of victim participation even before charges are filed.

A. A BRIEF HISTORY OF CRIME VICTIMS' RIGHTS

The crime victims' rights movement has sought to make crime victims important participants in the criminal justice process. The movement began in the wake of the Warren Court revolution, which extended new rights to criminal defendants. [7] With the courts paying increasing attention to criminal defendants, crime victims' advocates began to argue that the victims themselves had been overlooked. [8] The movement gained great visibility in the early 1980s when President Ronald Reagan appointed the President's Task Force on Victims of Crime. [9] The Task Force published a report concluding that "the criminal justice system has lost an essential balance… . The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed." [10]

The Task Force chronicled how crime victims were treated in all stages of the criminal justice process, from the police investigation through **[*64]** court proceedings, and ultimately to any parole or other release of the criminal. The Task Force

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[4] *18 U.S.C. § 3771*(c)(1).

[5] Id. § 3771(d)(3).

[6] See Douglas E. Beloof, Paul G. Cassell & Steven J. Twist, Victims in Criminal Procedure 3-39 (3d ed. 2010) (describing reforms from a historical perspective); see also, e.g., *18 U.S.C. § 3771*(a) (2012).

[7] See Beloof, Cassell & Twist, supra note 6, at 3-39 (describing the history of victims' rights in American law and the early days of the modern movement).

[8] See, e.g., William F. McDonald, Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim, 13 Am. Crim L. Rev. 649, 651-55 (1976).

[9] Exec. Order 12,360, *47 Fed. Reg. 17,975* (Apr. 27, 1982); see also President's Task Force on Victims of Crime, Final Report, at ii (1982).

[10] *President's Task Force on Victims of Crime, Final Report, supra* note 9, at 114.

then made a series of recommendations for all criminal justice agencies, including the police, prosecutors, and the courts. [11] The recommendations were designed to allow crime victims to receive information about, and to participate in, criminal cases.

In its most far-reaching recommendation, the Task Force proposed amending the U.S. Constitution to protect victims' rights. [12] The proposed ***amendment*** would have built on existing constitutional rights for criminal defendants by extending similar rights to crime victims. [13]

After the publication of the report, crime victims' advocates secured the passage of a series of state constitutional and legislative reforms. These measures guaranteed victims' rights in the criminal process, such as the right to be notified of court proceedings, to attend those proceedings, and to speak at appropriate points in the process, such as plea bargaining and sentencing. The measures were embodied in state statutes and, in more than thirty states, state constitutional "bills of rights" for crime victims. [14] While many of the measures had narrow participatory rights, [15] some of the ***amendments*** also contained more open-ended language, promising victims a right to fair treatment "throughout the criminal justice process." [16]

After successfully passing many state constitutional ***amendments***, crime victims' rights advocates sought to achieve the Task Force's broadest recommendation: to secure protection for victims' rights in the U.S. Constitution. In 1996, victims' advocates proposed a Victims' Rights ***Amendment*** in a Rose Garden ceremony attended by President Bill Clinton. [17] The proposed ***amendment*** contained a list of rights for crime victims, largely paralleling the rights contained in state victims' rights **[*65]** ***amendments***. [18] Congress considered the ***amendment*** several times, but it never obtained the requisite two-thirds support in both houses to secure the ***Amendment***'s approval. [19] Critics quarreled not so much with the goals of the ***amendment*** but rather with the necessity of constitutionalizing such rights. [20]

B. THE CRIME VICTIMS' RIGHTS ACT

Unable to obtain the necessary supermajority to pass a federal constitutional ***amendment***, in April 2004, crime victims' rights advocates decided to focus on federal legislation protecting crime victims. In exchange for backing off from their efforts to pass a constitutional ***amendment***, crime victims' advocates received near-universal congressional support for a "broad and

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[11] See id. at 56-82.

[12] Id. at 114.

[13] Id. at 114-15.

[14] For a map depicting the states with (and without) such ***amendments***, see State Victim Rights ***Amendments***, Nat'l Victims' Constitutional ***Amendment*** Passage, *http://goo.gl/znI4YW* (last visited Nov. 26, 2013); for discussion, see infra Part IV.D (discussing legislative reforms in a number of states).

[15] See, e.g., Cal. Const. art. I, § 28; Mich. Const. art. I, § 24; N.C. Const. art. I, § 37. For a detailed discussion of how one state constitutional ***amendment*** is intended to operate, see generally Paul G. Cassell, Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights ***Amendment***, *1994 Utah L. Rev. 1373.*

[16] E.g., Ariz. Const. art. II, § 2.1(A)(1); Mich. Const. art. I, § 24(1); Tex. Const. art. I, § 30(a)(1); see Cal. Const. art. I, § 28(b)(1) ("throughout the criminal or juvenile justice process").

[17] John M. Broder, Clinton Calls for Victims' Rights in Constitution, L.A. Times, June 26, 1996, at A1. For detailed discussions of the legislative efforts, see Paul G. Cassell, Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed ***Amendments*** in Light of the Crime Victims' Rights Act, *2005 BYU L. Rev. 835, 847-50.*

[18] See Cassell, supra note 17, at 848-49. For the pros and cons of the ***amendment*** as originally introduced, compare Paul G. Cassell, Barbarians at the Gates? A Reply to the Critics of the Victims' Rights ***Amendment***, *1999 Utah L. Rev. 479* [hereinafter Cassell, Barbarians at the Gates?], and Steven J. Twist, The Crime Victims' Rights ***Amendment*** and Two Good and Perfect Things, *1999 Utah L. Rev. 369,* with Robert P. Mosteller, The Unnecessary Victims' Rights ***Amendment***, *1999 Utah L. Rev. 443.* For a more recent discussion of a newer version of the ***amendment***, see Paul G. Cassell, The Victims' Rights ***Amendment***: A Sympathetic, Clause-by-Clause Analysis, *5 Phoenix L. Rev. 301 (2012).*

encompassing" statutory victims' bill of rights. [21] Victims' advocates sought to expand on the protections found in other previously-enacted victims' rights statutes, including, notably, the Victims' Rights and Restitution Act of 1990. [22] That statute had also included a bill of rights for crime victims, yet because of limited enforcement mechanisms, crime victims had been unable to secure court protection of the rights listed in the statute. [23]

The statute that Congress passed to solve these problems - the Crime Victims' Rights Act of 2004 - gave victims "the right to participate in the **[*66]** system." [24] It extended broad rights to crime victims, including "the right to be treated with fairness and with respect for the victim's dignity and privacy" [25] and "the reasonable right to confer with the attorney for the Government in the case." [26] It also commanded that these rights must be afforded by the Justice Department "and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime." [27] The ***CVRA*** also contained specific enforcement mechanisms. The Act provided that rights can be "asserted" by "the crime victim or the crime victim's lawful representative, and the attorney for the Government … ." [28] The courts were also required under the Act to "ensure that the crime victim is afforded the rights" given by the law. [29]

Congress appeared to have at least two goals in mind in passing the ***CVRA***. The first was simply to ensure that crime victims understood what was happening in the criminal justice process. This goal is apparent from the fact that the ***CVRA*** gives crime victims rights to notification about various court hearings, as well as more general rights to confer with prosecutors and to be treated with fairness. [30] The ***CVRA***'s Senate sponsors explained:

In case after case we found victims, and their families, were ignored, cast aside, and treated as non-participants in a critical event in their lives. They were kept in the dark by prosecutors too busy to care enough, by judges focused on [defendants'] rights, and by a court system that simply did not have a place for them. [31]

In passing the ***CVRA***, Congress sought to change the system's obliviousness to crime victims that often "left crime victims and their families victimized yet again." [32]

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[19] Hon. Jon Kyl et al., On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, *9 Lewis & Clark L. Rev. 581, 588-91 (2005).*

[20] Proposed Constitutional ***Amendment*** to Protect Crime Victims, S.J. Res. 1: Hearing Before the S. Comm. on the Judiciary, 108th Cong. 128-29 (2003) (statement of Sen. Patrick Leahy); see also Steven J. Twist & Daniel Seiden, The Proposed Victims' Rights ***Amendment***: A Brief Point/Counterpoint, *5 Phoenix L. Rev. 341, 356, 378 (2012)* (illustrating that the necessity dispute has endured to the present day).

[21] 150 Cong. Rec. 7295 (2004) (statement of Sen. Dianne Feinstein); see also Kyl et al., supra note 19, at 591-93.

[22] Victims' Rights and Restitution Act of 1990, Pub. L. No. 101-647, ***104 Stat. 4820*** (codified as amended at *42 U.S.C.§§10601,* 10606-07 (2006)).

[23] See, e.g., *United States v. McVeigh, 106 F.3d 325, 328 (10th Cir. 1997)* (per curiam) (refusing to enforce a victim's right to attend a trial); Cassell, Barbarians at the Gates?, supra note 18, at 515-22 (discussing McVeigh).

[24] 150 Cong. Rec. 7297; see *18 U.S.C. § 3771* (2012). For a description of victim participation, see Beloof, Cassell & Twist, supra note 6, at 728-33.

[25] *18 U.S.C. § 3771*(a)(8).

[26] Id. § 3771(a)(5).

[27] Id. § 3771(c)(1).

[28] Id. § 3771(d)(1).

[29] Id. § 3771(b)(1).

[30] See id. § 3771(a).

[31] 150 Cong. Rec. 7296 (2004) (statement of Sen. Dianne Feinstein).

A second overarching purpose of the ***CVRA*** was to allow crime victims to play a role in the criminal justice process. Through the ***CVRA***, Congress intended to make victims "independent participants" in the criminal justice process. [33] The ***CVRA*** extends to crime victims a series of "rights" in the criminal justice process - rights that the victims have **[*67]** independent standing to assert. [34] Congress viewed these provisions as establishing a victim's right "to participate in the process where the information that [victims] and their families can provide may be material and relevant … ." [35]

Congress appears to have had both intrinsic and instrumental reasons for wanting crime victim participation. Congress clearly thought that such participation was valuable in its own right. Senator Kyl embodied this belief and explained his decision to become involved in the crime victims' rights movement because of his discovery that victims:

were suffering through the trauma of the victimization and then being thrown into a system which they did not understand, which nobody was helping them with, and which literally prevented them from participation in any meaningful way. I came to realize there were literally millions of people out there being denied these basic rights … . [36]

But Congress also thought crime victim participation in the criminal justice system could be instrumentally useful. For example, in protecting a victim's right to be heard by those determining a defendant's sentence, a victim might be able to provide important information that could alter that sentence. As a result, the sentence might reflect a fuller appreciation of the danger posed by a defendant, and the judge might take appropriate steps to prevent others from being victimized. [37]

Congress also intended to ensure that crime victims were not revictimized in the criminal justice process - that is, that they would not suffer what scholars have called "secondary harm" in the process. [38] The concern is that victims suffer when they are excluded from the criminal justice process. Congress sought to end that suffering by making victims meaningful participants in criminal cases. [39]

C. AN ILLUSTRATION OF THE PRE-CHARGING ISSUE: THE JEFFREY EPSTEIN CASE

Given the potentially expansive scope of victims' rights under both state provisions and the ***CVRA***, a critical question arises about how to apply them: Do the rights come into existence only after prosecutors formally file **[*68]** criminal charges? Or do they attach at some earlier point in the process? Does v. United States, a federal case in the U.S. District Court for the Southern District of Florida, usefully illustrates the issue. [40] In that case, the U.S. Attorney's Office for the Southern District of Florida

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[32] Id.

[33] Id. at 7302 (statement of Sen. Jon Kyl).

[34] Compare *18 U.S.C. § 3771*(d), with Susan Bandes, Victim Standing, *1999 Utah L. Rev. 331, 344-45* (illustrating the debate surrounding victim standing prior to adoption of the ***CVRA***).

[35] 150 Cong. Rec. 7296 (statement of Sen. Dianne Feinstein).

[36] Id. at 7298 (statement of Sen. Jon Kyl).

[37] Id.

[38] See, e.g., Douglas Evan Beloof, The Third Model of Criminal Process: The Victim Participation Model, *1999 Utah L. Rev. 289, 294-96;* Richard A. Bierschbach, Allocution and the Purposes of Victim Participation Under the ***CVRA***, 19 Fed. Sent'g Rep. 44, 46 (2006).

[39] 150 Cong. Rec. 7298 (statement of Sen. Jon Kyl).

[40] *Does v. United States, 817 F. Supp. 2d 1337 (S.D. Fla. 2011).* In the interest of full disclosure, two of the authors of this Article (Cassell and Edwards) are co-counsel for the victims in this case. The statement of the facts in this Article draws heavily on the victims' allegations as they have detailed in their pending motion for summary judgment in the case. See Jane Doe #1 & Jane Doe #2's *Motion for Finding of Violations of the Crime Victims' Rights Act and Request for a Hearing on Appropriate Remedies at 3-23, Does, 817 F. Supp. 2d 1337* (No. 9:08-cv-80736-KAM) [hereinafter Jane Doe Motion] (providing fifty-three proposed facts in the case). The U.S. Attorney's Office has generally disputed some of these allegations without offering specifics as to what happened. See, e.g., United States' Response to Jane Doe #1 & Jane Doe #2's *Motion for Finding of Violations of the Crime Victim Rights Act and Request for a Hearing on Appropriate Remedies at 34-43, Does, 817 F. Supp. 2d 1337* (No. 9:08-cv-80736-KAM) [hereinafter United States' Response]. As of this writing, Epstein has declined to intervene in the case to dispute the allegations.

developed considerable evidence that Jeffrey Epstein, a billionaire with extensive political and social connections, [41] had sexually molested more than thirty young girls between 2001 and 2007 at his West Palm Beach mansion. [42] The U.S. Attorney's Office entered into contentious plea negotiations with Epstein over how the case should be resolved. The prosecutors initially sought a resolution that would have required Epstein to plead guilty to at least a felony sex offense. After pressure from Epstein, for reasons that have never been clearly explained, [43] the U.S. Attorney's Office agreed to enter into a nonprosecution agreement. Under the agreement, the U.S. Attorney's Office agreed not to prosecute him and, in exchange, Epstein agreed to plead guilty to two state felonies for soliciting prostitution with a minor. After entering those guilty pleas, Epstein was sentenced to only eighteen months in state jail. [44] No federal charges were ever filed and **[*69]** Epstein spent much of the jail term on "work release" to his luxurious office. [45]

The U.S. Attorney's Office did not tell Epstein's victims about the nonprosecution agreement until well after it had taken effect. To the contrary, even after the nonprosecution agreement had been signed, the Office continued to tell the victims that the case was still "under investigation" and that they should be "patient." [46] When the victims learned of the agreement, two of them (Jane Doe Number One and Jane Doe Number Two) filed suit in federal court under the Crime Victims' Rights Act, arguing that the prosecutors had violated their ***CVRA*** right to confer as well as their right to be treated fairly. [47] The victims contended that prosecutors should have conferred with them about the nonprosecution agreement before it became final.

In response, the U.S. Attorney's Office argued primarily that it was under no obligation to extend the victims any rights under the ***CVRA***. It was the Government's blunt position that "***CVRA*** rights do not attach in the absence of federal criminal charges filed by a federal prosecutor." [48] In short, the Government argued it was not required to confer in any way with the victims, or even treat them fairly, because the ***CVRA*** was not yet in play. The issue is thus squarely framed: Is the Government correct in its assertion that it has no ***CVRA*** obligations in cases like the Epstein case where federal prosecutors never lodged federal charges against a suspect? In view of the ***CVRA***'s prominence, resolution of this issue may shed important light on the nature of crime victims' enactments and the breadth of the role that crime victims should have in the criminal justice process.

II. The ***CVRA***'s Application Before Formal Charges are Filed

To analyze the issue of whether the ***CVRA*** extends rights to crime victims before prosecutors have formally filed charges, it is useful to look at the ***CVRA***'s purposes, language, and judicial interpretations. This Part looks at each of these three issues in turn.

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[41] See, e.g., Paul Harris, Prince Andrew's Link to Sex Offender Jeffrey Epstein Taints Royalty in US, Guardian (Mar. 12, 2011), *http://goo.gl/0I4vAE*; Landon Thomas Jr., Jeffrey Epstein: International Moneyman of Mystery, N.Y. Mag., *http://goo.gl/11Cayc* (last visited Nov. 26, 2013).

[42] See Jane Doe Motion, supra note 40, at 3-4; Abby Goodnough, Questions of Preferential Treatment Are Raised in Florida Sex Case, N.Y. Times, Sept. 3, 2006, at A19.

[43] The U.S. Attorney responsible for the plea deal later revealed that after negotiations started, "what followed was a year-long assault on the prosecution and the prosecutors" by Epstein. Letter from R. Alexander Acosta, former U.S. Att'y, to Whom It May Concern (Mar. 20, 2011), reprinted in Conchita Sarnoff, Behind Pedophile Jeffrey Epstein's Sweetheart Deal, Daily Beast (Mar. 25, 2011, 3:17 AM), *http://goo.gl/kyveiF*. Acosta, however, claimed that the pressure did not influence the ultimate disposition of the case. Id.

[44] Landon Thomas Jr., From Paradise to County Jail: A Billionaire Financial Adviser Will Serve 18 Months in Sex Case, N.Y. Times, July 1, 2008, at C1.

[45] See Michele Dargan, Feds Say They Treated Epstein Victims Fairly, Palm Beach Daily News (Apr. 8, 2011, 7:23 PM), *http://goo.gl/rTGDed*; Conchita Sarnoff, Billionaire Pedophile Goes Free, Daily Beast (July 20, 2010, 7:05 PM), *http://goo.gl/MSTi17*.

[46] See Jane Doe Motion, supra note 40, at 14, 16 (internal quotation marks and citations omitted).

[47] See Emergency Victim's Petition for Enforcement of Crime Victim's Rights Act, *18 U.S.C. Section 3771* at 2, *Does v. United States, 817 F. Supp. 2d 1337 (S.D. Fla. 2011)* (No. 9:08-cv-80736-KAM).

[48] *United States' Response, supra* note 40, at 7.

[*70]

A. THE ***CVRA***'S PURPOSES

An analysis of the ***CVRA***'s application before prosecutors have filed charges must begin by assessing the ***CVRA***'s purposes because any interpretation of the ***CVRA*** that is divorced from the statute's purposes would run the risk of defeating the statute's aims. It is axiomatic that courts should "give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question." [49]

As discussed above, [50] one important goal of the ***CVRA*** was to keep crime victims informed about any developments in the criminal justice process. But the need to be informed does not begin with the filing of a formal criminal charge. A crime victim needs to know what is happening before formal charging - during a criminal investigation, for example - just as much as she needs to know what is happening in court. Indeed, she may have a greater need to know, as she may be concerned that the criminal who harmed her is still on the loose, posing a danger to her.

Similarly, concerning the second purpose - facilitating victim participation [51] - without a right to pre-charging involvement, victims may be effectively shut out of the process entirely. The Epstein case provides a useful illustration of why the ***CVRA*** must be understood to extend rights to victims prior to indictment. The prosecutors handling the investigation reached an agreement with Epstein that barred federal prosecution of sex offenses committed against dozens of victims, including Jane Doe Number One and Jane Doe Number Two. If ***CVRA*** rights did not extend to the negotiations surrounding the agreement, then the victims never would have had any ability to participate in the resolution of the case. [52]

A construction of the ***CVRA*** that extends rights to victims before charges are filed would be entirely consistent with the ***CVRA***'s participatory purpose. If victims have the ability to participate in a pre-charging plea bargaining process, for example, victims can help ensure that prosecutors do not overlook anything that should be covered in the plea deal. For example, victims might be able to obtain agreement to a "no contact" order or valuable restitution - points that the prosecutor might fail **[*71]** to consider in crafting a plea. Similarly, allowing victims to participate early in the process avoids retraumatizing victims. Again, as the Epstein case usefully illustrates, it may be extremely difficult for victims to discover after the fact that potential criminal charges against a criminal who has abused them have been secretly bargained away. Jane Doe Number One and Jane Doe Number Two, for example, were outraged when they discovered prosecutors had entered into an agreement blocking any prosecution of sex offenses Epstein committed against them - and all without telling them. [53]

In short, the purposes animating the ***CVRA*** all suggest that the Act was meant to, and should, extend rights to crime victims before formal charges are filed.

B. THE ***CVRA***'S PLAIN LANGUAGE

While the general purposes of the ***CVRA*** support a broad interpretation of the Act, it is important to examine whether those purposes have been expressed in the Act's language. Without a linkage to the Act's text, the general purpose might not provide

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[49] *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson, 130 S. Ct. 1396, 1409 (2010)* (quoting *United States v. Bornstein, 423 U.S. 303, 310 (1976))* (internal quotation marks omitted).

[50] See supra notes 24-27.

[51] See supra notes 28-29.

[52] Even the Justice Department seems to recognize this point. As a matter of policy, the Department extends to victims the right to confer with prosecutors in situations where plea discussions occur before charges have been brought. U.S. Dep't of Justice, Office for Victims of Crime, Attorney General Guidelines for Victim and Witness Assistance 41-42 (2011 ed., rev. May 2012) [hereinafter Attorney General Guidelines].

[53] Without disclosing confidential attorney-client communications, this fact is readily apparent from victims' filings in the Epstein case. See, e.g., Jane Doe Motion, supra note 40, at 17 (stating that the victims relied on the U.S. Attorney's Office representatives "to their detriment[,]" that if they knew the true facts, "they would have taken steps to object" to the plea agreement, and that they believed criminal prosecution to be "extremely important").

a sound basis for interpretation. [54] But the ***CVRA***'s plain language makes clear that Congress intended for the law to provide at least some rights to crime victims throughout the criminal justice process, even before the filing of criminal charges.

According to its text, the ***CVRA*** provides eight specifically enumerated rights for crime victims and an additional right to be reasonably notified of these rights. [55] Some of these rights presuppose the formal filing of criminal charges. For instance, the ***CVRA*** extends to victims the "right to reasonable, accurate, and timely notice of any public court proceeding." [56] That particular right obviously does not apply before charges are filed, as no "court proceedings" exist before a defendant is charged.

But the ***CVRA*** also promises crime victims rights that are not specifically tied to court proceedings. Perhaps most expansively, the ***CVRA*** guarantees victims the "right to be treated with fairness and with **[*72]** respect for the victim's dignity and privacy," [57] a broad right that does not appear to be directly linked to a filed court case. Similarly, the ***CVRA*** promises victims the "reasonable right to confer with the attorney for the Government in the case." [58] In this section, the ***CVRA***'s drafters appear to have eschewed a reference to court proceedings, using a broader term instead. Of course, a "case" can refer both to a judicial case before a court and an investigative case pursued by a law enforcement officer. It is common usage to say such things as, "The police officer investigated and solved the case." Dictionary definitions of the word "case" support this varied interpretation. [59]

If there remained any doubts about whether the ***CVRA*** applies during the investigative part of the criminal justice process, two other provisions in the ***CVRA*** resolve them. The ***CVRA*** specifically directs that "officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in [the ***CVRA***]." [60] Of course, there would be no reason to direct that agencies involved in the "detection" and "investigation" of crime have ***CVRA*** obligations if the Act did not extend to pre-charging situations. Congress thus directly envisioned the victims' rights law to apply during the "detection" and "investigation" phases of criminal cases.

Similarly, the ***CVRA***'s venue provision instructs that crime victims who seek to assert rights in pre-charging situations should proceed in the court where the crime was committed: "The rights described in subsection (a) [of the ***CVRA***] shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred." [61] Here again, it is hard to see why this provision would be necessary unless the ***CVRA*** applies before the formal filing of charges.

For all these reasons, the ***CVRA***'s plain language indicates that the victims have protected rights under the Act even before charges are filed.

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C. COURTS RECOGNIZE THAT CRIME VICTIMS HAVE ***CVRA*** RIGHTS BEFORE CHARGING

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[54] See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 56 (2012).

[55] *18 U.S.C. § 3771*(a) (2012) (enumerating eight rights); id. § 3771(c)(1) (requiring government officers use "their best efforts" to notify victims of their rights).

[56] Id. § 3771(a)(2).

[57] Id. § 3771(a)(8).

[58] Id. § 3771(a)(5) (emphasis added).

[59] See, e.g., Black's Law Dictionary 243-44 (9th ed. 2009) (defining, among the definitions of "case," a "test case" as "[a] criminal investigation" as in "the Manson case"); Webster's Third New International Dictionary of the English Language Unabridged 345 (1993) (defining "case" as "a circumstance or situation (as a crime) requiring investigation or action by the police or other agency").

[60] *18 U.S.C. § 3771*(c)(1) (emphasis added).

[61] Id. § 3771(d)(3) (emphasis added).

Because crime victims lack a right to appointed counsel, many victims have difficulty litigating the scope of their rights. [62] But in a few cases, victims have been able to secure counsel to argue that they have rights in the criminal justice process during the investigation of federal crimes. When those cases have reached the issue of whether the ***CVRA*** applies before charges have been filed, courts have uniformly agreed with the victims' position.

Perhaps the leading case to date to assess this question is the Fifth Circuit's decision in In re Dean. [63] There, a wealthy corporate criminal defendant reached a generous plea deal with the Government - a deal that the Government filed for approval with the district court without conferring with the victims. Citing procedural rights under the ***CVRA***, the victims requested that the trial court reject the plea agreement. [64] The District Court for the Southern District of Texas specifically concluded that victims' ***CVRA*** rights could apply during the investigation of the crime: "There are clearly rights under the ***CVRA*** that apply before any prosecution is underway." [65] The district court concluded, however, that the Government had not violated the ***CVRA*** because it had secured judicial permission to dispense with notification to victims. [66]

The victims sought appellate review in the Fifth Circuit. [67] There, the court concurred with the district court that ***CVRA*** rights apply before trial. Unlike the district court, however, it held that the Government had violated the victims' rights:

The district court acknowledged that "there are clearly rights under the ***CVRA*** that apply before any prosecution is underway." Logically, this includes the ***CVRA***'s establishment of victims' "reasonable right to confer with the attorney for the Government." At least in the posture of this case (and we do not speculate on the **[*74]** applicability to other situations), the government should have fashioned a reasonable way to inform the victims of the likelihood of criminal charges and to ascertain the victims' views on the possible details of a plea bargain. [68]

The Fifth Circuit then remanded the matter to the district court to determine the appropriate remedy for the violation of the victims' rights. [69]

The Fifth Circuit's decision in Dean has been cited favorably in four recent district court decisions, which provides further support for the conclusion that the ***CVRA*** applies before charges have been filed. In United States v. Rubin, [70] victims of a federal securities fraud argued that they had ***CVRA*** rights even before prosecutors filed a superseding indictment covering the specific crimes affecting the victims. Citing Dean, the District Court for the Eastern District of New York agreed that the rights

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[62] John W. Gillis & Douglas E. Beloof, The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts, *33 McGeorge L. Rev. 689, 693 (2002).*

[63] *527 F.3d 391 (5th Cir. 2008).* Other aspects of the case are discussed in Paul G. Cassell & Steven Joffee, The Crime Victims' Expanding Role in a System of Public Prosecution: *A Response to the Critics of the Crime Victims' Rights Act, 105 Nw. U. L. Rev. Colloquy 164, 172-76 (2011).*

[64] *In re Dean, 527 F.3d at 392.*

[65] United States v. BP Prods. N. Am. Inc., No. H-07-434, 2008 WL 501321, at 11 (S.D. Tex. Feb. 21, 2008).

[66] Id. at 1, 19.

[67] For discussion of the difficulties crime victims face to obtain appellate review of their claims, see generally Paul G. Cassell, Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision, *87 Denv. U. L. Rev. 599 (2010).*

[68] *In re Dean, 527 F.3d at 394* (internal citations omitted).

[69] *Id. at 396.* On remand, the district court held additional hearings in which the victims participated, satisfying their ***CVRA*** rights. See *United States v. BP Prods. N. Am. Inc., 610 F. Supp. 2d 655, 660 (S.D. Tex. 2009).*

[70] *558 F. Supp. 2d 411 (E.D.N.Y. 2008).*

were expansive and could apply before charges were filed but were subject to the outer limit that the Government has at least "contemplated" charges. [71]

Similarly, in United States v. Oakum, [72] the District Court for the Eastern District of Virginia considered a claim that ***CVRA*** rights did not apply until after a defendant had been convicted. In rejecting that argument, the court agreed with the Dean court that victims acquire rights even before a prosecution begins. [73]

The District Court for the Northern District of Indiana held to the same effect in In re Petersen. [74] There, the court held that a victim's right to be treated with fairness and with respect for [his or her] dignity and privacy "may apply before any prosecution is underway and isn't necessarily tied to a "court proceeding' or "case.'" [75] The court, however, found that the "conclusory allegations" in the victims' petition did not "create a plausible claim for relief under the ***CVRA***." [76]

[*75] Perhaps the most extensive discussion of this issue has come from the Epstein case discussed earlier. [77] Overruling the Government's argument that the ***CVRA*** only applies after the formal filing of charges, Does v. United States held that "the statutory language clearly contemplates pre-charge proceedings." [78] The court in Does explained that "court proceedings involving the crime are not limited to post-complaint or post-indictment proceedings, but can also include initial appearances and bond hearings, both of which can take place before a formal charge." [79] The court also noted that the ***CVRA***'s "requirement that officials engaged in "detection [or] investigation' [of crimes] afford victims the rights enumerated in subsection (a) surely contemplates pre-charge application of the ***CVRA***." [80] Finally, the court in Does noted that "if the ***CVRA***'s rights may be enforced before a prosecution is underway, then, to avoid a strained reading of the statute, those rights must attach before a complaint or indictment formally charges the defendant with the crime." [81]

In sum, the relevant case law unanimously agrees that the ***CVRA*** extends rights to crime victims before charges have been filed.

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[71] *Id. at 419* (internal citation omitted). Rubin's suggestion about limitations that apply to pre-indictment assertions of rights is discussed at notes 184-187 and 193 infra and accompanying text.

[72] No. 3:08cr132, *2009 WL 790042* (E.D. Va. Mar. 24, 2009).

[73] Id. at 2.

[74] No. 2:10-CV-298 RM, 2010 WL 5108692 (N.D. Ind. Dec. 8, 2010).

[75] Id. at 2 (citing *In re Dean, 527 F.3d 391, 394 (5th Cir. 2008);* United States v. BP Prods. N. Am. Inc., H-07-434, 2008 WL 501321 (S.D. Tex. Feb. 21, 2008)).

[76] Id. Petersen also held that one specific ***CVRA*** right - the right to confer - only applies after charges have been filed. Id. But the authorities Petersen cites for that proposition prove no such thing. Confusingly, Petersen cited the Fifth Circuit's ruling in Dean for support; but (as just explained above) Dean held exactly the opposite. Similarly, Petersen cites other cases involving the right to confer after charges have been filed. Id. But none of these cases actually presented the issue of the ***CVRA***'s application to pre-indictment situations, since charges had already been filed in each of these cases. See, e.g., *In re Stewart, 552 F.3d 1285, 1289 (11th Cir. 2008).*

[77] *Does v. United States, 817 F. Supp. 2d 1337 (S.D. Fla. 2011).*

[78] *Id. at 1341.*

[79] Id.

[80] *Id. at 1342.*

[81] Id. Recently, the district court in the Does case also rejected Government efforts to dismiss the action. The district court found that, if the victims could prove the factual allegations they have made, then they would be entitled to relief, including potentially the relief of invalidating the nonprosecution agreement that Epstein obtained from the Government. Does v. United States, No. 9:08-cv-80736-KAM, 2013 WL 3089046, at 3 (S.D. Fla. June 19, 2013).

III. The Justice Department's Unpersuasive Position

Despite the ***CVRA***'s broad remedial purposes, its expansive language referring to investigations, and the unanimous case law extending rights to victims prior to defendants being charged, the OLC released a memorandum in 2011 concluding that ***CVRA*** rights attach only "from the time that criminal proceedings are initiated (by complaint, information, or indictment)." [82] OLC's analysis is unpersuasive. Although OLC's opinion **[*76]** invokes the ***CVRA***'s definition of crime "victim," its legislative intent, and its structure, a closer reading of each demonstrates little support for the notion that crime victims must await the formal filing of charges before accruing ***CVRA*** rights.

A. OLC'S MISREADING OF THE ***CVRA***'S DEFINITION OF "VICTIM"

OLC's lead argument is that the ***CVRA***'s definition of "victim" presupposes that criminal charges have been formally filed. [83] The ***CVRA*** defines a "victim" who is protected as "a person directly and proximately harmed as a result of the commission of a Federal offense." [84] Focusing on the word "offense," OLC concedes that it does not "conclusively resolve" the question of when rights attach. Nevertheless, OLC claims that the word "naturally suggests that a person's status as a "crime victim' can only be determined after there has been a formal decision to charge a defendant with a particular Federal offense." [85] OLC goes on to elaborate:

Under this reading, the earliest that a "crime victim" under the Act could be identified would be upon the filing of a criminal complaint - that is, at the earliest point at which there is a sworn written statement of probable cause to believe that a particular defendant committed an identified Federal offense and hence the first point at which it is possible with any certainty to identify a "crime victim" directly and proximately harmed by the commission of that offense. [86]

OLC is disingenuous in asserting that the "first point" at which a person has been harmed by a federal crime arises only after a criminal complaint has been filed. The Department routinely makes such determinations at earlier points in criminal cases, such as when it sends a "target letter" to a defense attorney during a grand jury investigation. [87] Indeed, OLC remarkably ignores the fact that the Department is directly required to identify victims of a crime before the filing of a criminal complaint, both by statute and through internal policy directives.

The Victims' Rights and Restitution Act of 1990 (VRRA) [88] requires the Department to identify victims before the filing of a criminal complaint. **[*77]** Passed in 1990, the VRRA provided crime victims with a set of procedural rights similar to those found in the ***CVRA***, along with rights to notification about victim services. [89] In 2004, the ***CVRA*** repealed and replaced the section of the VRRA listing procedural rights, while leaving other parts of the VRRA intact. [90] Under the remaining parts of

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[82] OLC ***CVRA*** Rights Memo, supra note 2, at 1. Although the opinion is dated December 17, 2010, it was publicly released on May 20, 2011. See Letter from Jon Kyl, supra note 3.

[83] OLC ***CVRA*** Rights Memo, supra note 2, at 6.

[84] *18 U.S.C. § 3771*(e) (2012) (emphasis added).

[85] OLC ***CVRA*** Rights Memo, supra note 2, at 5.

[86] Id.

[87] A target letter explains the procedural process underlying an indictment and places the defendant on notice of the general nature of the government's criminal investigation. See U.S. Dep't of Justice, Title 9: U.S. Attorneys' Criminal Resource Manual § 160, [hereinafter Criminal Resource Manual] available at *http://goo.gl/YHLDke* (providing an example target letter); infra Part III.A (developing this point further).

[88] Pub. L. No. 101-647, ***104 Stat. 4820*** (codified as amended at *42 U.S.C. §§10601,* 10606-07 (2006)).

[89] See supra notes 22-23 and accompanying text.

[90] Justice for All Act of 2004, Pub. L. No. 108-405, § 102(a), ***118 Stat. 2260, 2261 (2004)*** (codified at *18 U.S.C. § 3771*(a) (2012)).

the VRRA, the Justice Department must inform victims of federal crimes of services that are available to them, including "emergency medical and social services," counseling, and support. [91] The Department is further obligated to keep victims fully informed about "the status of the investigation of the crime, to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation." [92] These rights to notice about "emergency medical and social services" [93] as well as to the "status of the investigation of the crime" [94] obviously require the Department to identify victims of federal crimes before formal charges have been filed. Indeed, the VRRA makes this point clear by directing the Department to not only notify the victim about the status of the investigation but also about the later "filing of charges against a suspected offender." [95] The VRRA then extends victims' rights to information through the rest of the criminal justice process by requiring the Department to provide notice to victims of such things as the imposed sentence and the defendant's release. [96]

The VRRA not only requires the Department to identify victims during the investigation of a crime, it also defines those victims in a very similar fashion to the ***CVRA***. The VRRA defines "victim" as a "person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime." [97] Thus, the Department is already routinely identifying persons who have been "harmed" by federal crimes shortly after the commission of those crimes and well before formal charging.

The Attorney General has also promulgated internal guidelines requiring Justice Department components to identify victims rapidly after a crime. The Attorney General Guidelines for Victim and Witness Assistance provide that "Department responsibilities to crime victims begin as soon as possible after the detection of a crime at which they may be undertaken **[*78]** without interfering in the investigation. Generally, this point in time is defined by the opening of a criminal investigation." [98]

Given the way the two statutes work, it would make no sense to artificially confine the ***CVRA***'s reach until after the filing of a criminal complaint. Before then, victims will have often received information from the Department about the status of the investigation. They might wish to confer with prosecutors about how the case is proceeding, and the ***CVRA*** extends to them a right to confer. [99] Similarly, while the Department is notifying victims about the services they may receive and the status of an investigation, it is important that the victims be treated fairly. The ***CVRA*** extends the right to be treated fairly. [100] Indeed, it would be absurd to think that Congress wanted to permit the Justice Department to treat crime victims unfairly until criminal charges have been filed.

Instead of recognizing Congress's intent, OLC's 2011 memorandum simply cites to a series of cases in which courts concluded that a victim of uncharged conduct should not be afforded statutory protections. [101] Yet none of these cases - United States v. Turner, [102] Searcy v. Paletz, [103] or Searcy v. Skinner [104] - provide strong support for OLC's position. Turner is a particularly

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[91] See *42 U.S.C. § 10607*(c).

[92] Id. § 10607(c)(3)(A).

[93] Id. § 10607(c)(1)(A).

[94] Id. § 10607(c)(3)(A).

[95] Id. § 10607(c)(3)(C).

[96] Id. § 10607(c)(3)(G).

[97] Id. § 10607(e)(2).

[98] Attorney General Guidelines, supra note 52, at 7 (internal citations omitted); see also *42 U.S.C. § 10607*(b).

[99] *18 U.S.C. § 3771*(a)(5) (2012) (preserving "the reasonable right to confer with the attorney for the Government in the case").

[100] Id. § 3771(a)(8) (preserving "the right to be treated with fairness and with respect for the victim's dignity and privacy").

[101] OLC ***CVRA*** Rights Memo, supra note 2, at 6 n.6.

[102] *367 F. Supp. 2d 319 (E.D.N.Y. 2005).*

poor fit. Although OLC's memorandum characterizes Turner as excluding victims of uncharged conduct, [105] the magistrate judge adopted an inclusive reading of the statute precisely because of his reservations about the ***CVRA***'s legislative history and plain language. The judge suggested that "any person who self-identifies as [a victim]" could be presumed to qualify for protection under the ***CVRA*** as a preliminary matter. [106] In fact, the line quoted by the Department is lifted out of context. The full sentence reads: "While the offense charged against a defendant can **[*79]** serve as a basis for identifying a "crime victim' as defined in the ***CVRA***, the class of victims with statutory rights may well be broader." [107]

Paletz and Skinner similarly provide scant support for the Department's position. In Skinner, a prison inmate attempted to bring a pro se civil suit against another inmate for allegedly attacking him during incarceration. [108] In dismissing the suit in an unpublished decision, the district court recognized that the Government had expressly declined to bring charges against the other inmate and concluded that the ***CVRA*** did not create a "mechanism to bring an action against Defendant directly." [109] In Paletz, that same inmate brought a similar pro se claim against another inmate, the Federal Bureau of Prisons, the FBI, and the U.S. Attorney General. [110] In a parallel, unpublished decision, the district court dismissed the suit, noting that the ***CVRA*** is designed to give victims certain rights "within the prosecutorial process against a criminal defendant." [111]

Because Skinner and Paletz involve (apparently frivolous) civil suits, they say nothing about the ***CVRA***'s reach in criminal cases, and any language to that effect would be pure dicta. Moreover, the courts' terse analysis in both cases does not contain any substantive discussion of whether ***CVRA*** rights apply in criminal cases before the filing of charges. Instead, the courts simply cited to language from a Second Circuit decision that stated that the ***CVRA*** does not give victims any rights against defendants until those defendants have been convicted [112] - a holding clearly limited to restitution, as many other ***CVRA*** rights clearly apply before conviction. [113] Reviewing these two cases in an extended, published opinion, the U.S. District Court for the Southern District of Texas noted that reading these two decisions as standing for the proposition that charges must be filed for ***CVRA*** rights to attach "appears inconsistent with the ***CVRA*** recognition of certain subsection (a) rights that apply during investigation, before any charging instrument is filed." [114] As a result, OLC **[*80]** vastly overstates its position when it asserts

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[103] No. 6:07-1389-*GRA-WMC, 2007 WL 1875802* (D.S.C. June 27, 2007).

[104] No. 6:06-1418-*GRA-WMC, 2006 WL 1677177* (D.S.C. June 16, 2006).

[105] OLC ***CVRA*** Rights Memo, supra note 2, at 6 n.6.

[106] *Turner, 367 F. Supp. 2d at 327* ("Instead, I have taken and will continue to follow an inclusive approach: absent an affirmative reason to think otherwise, I will presume that any person whom the government asserts was harmed by conduct attributed to a defendant, as well as any person who self-identifies as such, enjoys all of the procedural and substantive rights set forth in § 3771.").

[107] *Id. at 326.*

[108] Skinner, 2006 WL 1677177, at 1-2.

[109] Id. at 2.

[110] Searcy v. Paletz, No. 6:07-1389-GRA-WMC, 2007 WL 1875802, at 1-2 (D.S.C. June 27, 2007).

[111] Id. at 2.

[112] Id. ("However, "the ***CVRA*** does not grant victims any rights against individuals who have not been convicted of a crime.'" (quoting *In re W.R. Huff Asset Mgmt. Co., 409 F.3d 555, 564 (2d Cir. 2005))).*

[113] Of course, a defendant cannot be ordered to pay restitution as part of his sentence until he has been found guilty. See *18 U.S.C. § 3664* (2012) (describing sentencing procedures for ordering restitution).

[114] United States v. BP Prods. N. Am. Inc., No. H-07-434, 2008 WL 501321, at 12 n.7 (S.D. Tex. Feb. 21, 2008).

that "most courts … have declined to extend enforceable rights under the ***CVRA*** to alleged victims of conduct that did not lead to criminal proceedings." [115] All the courts that have actually reached the issue have concluded exactly the opposite. [116]

B. OLC'S DISTORTION OF THE ***CVRA***'S STRUCTURE AND LEGISLATIVE HISTORY

The next section of OLC's memorandum maintains that the ***CVRA***'s structure and legislative history lead to the conclusion that the ***CVRA*** is "best understood" as extending rights after charges have been filed. Here again, OLC's analysis is truncated at best and misleading at worst.

OLC begins this part of its analysis by observing that some of the rights in the ***CVRA*** are limited to court proceedings. OLC notes, for example, that the ***CVRA*** gives victims the "right to reasonable, accurate, and timely notice of any public court proceeding … involving the crime." [117] But the fact that some of the rights listed in the ***CVRA*** apply to court proceedings hardly means that all of the rights are to be so restricted. The federal criminal justice process includes stages that are pre-charging, post-charging, and post-conviction. It would hardly be surprising to find that a statute that Congress intended to be "broad and encompassing" [118] covered events occurring after the filing of charges.

Indeed, OLC appears to recognize that at least three of the rights listed in the ***CVRA*** could easily apply before charges are filed: (1) the "right to be reasonably protected from the accused"; (2) the "reasonable right to confer with the attorney for the Government in the case"; and (3) the "right to be treated with fairness and with respect for the victim's dignity and privacy." [119] None of these rights explicitly refer to court "proceedings" or other events (such as parole hearings) that necessarily occur after the filing of formal charges. [120]

[*81] For purposes of this Article, it is appropriate to focus on the last two of these three rights: the right to confer and the right to fair treatment. The first of these three rights - the right to be reasonably protected - is already clearly extended by another statute to crime victims before the filing of charges. While OLC does not acknowledge this fact, the VRRA extends the first right to crime victims, directing that a "responsible official shall arrange for a victim to receive reasonable protection from a suspected offender and persons acting in concert with or at the behest of the suspected offender." [121] Because a "suspected" offender obviously exists before the filing of criminal charges, the VRRA envisions the right to protection being provided as soon as is practical after a victim suffers from the commission of a crime. Additionally, the sections of the Attorney General Guidelines for Victim and Witness Assistance addressing the VRRA direct that Justice Department components must provide reasonable protection even before the filing of criminal charges. [122] So, under the VRRA, the Justice Department should

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[115] OLC ***CVRA*** Rights Memo, supra note 2, at 5-6. Notably, the Department does not embrace the language from Huff found within the Skinner and Paletz decisions because presumably such an approach would be contrary to many of the rights found in the ***CVRA***.

[116] See infra Part I.C.

[117] OLC ***CVRA*** Rights Memo, supra note 2, at 6 (emphasis added) (quoting *18 U.S.C. § 3771*(a)(2)).

[118] 150 Cong. Rec. 7295 (2004) (statement of Sen. Dianne Feinstein).

[119] OLC ***CVRA*** Rights Memo, supra note 2, at 7-8, 10 (quoting *18 U.S.C. § 3771*(a)(1), (5), (8)).

[120] OLC appears to have overlooked another right that could well apply before charges are filed: the right to be notified of one's rights under the ***CVRA***. See *18 U.S.C. § 3771*(c)(1) (requiring prosecutors to "make their best efforts to see that crime victims are notified of, and accorded, the rights described in [the ***CVRA***]"); *United States v. Rubin, 558 F. Supp. 2d 411, 428 (E.D.N.Y. 2008)* (discussing potential application of the right to notification of rights before charges are filed). For purposes of this Article, it is not necessary to explore this right in detail. If other ***CVRA*** rights apply before charges are filed, a fortiori this right does as well. If a victim has a right, presumably the victim should be notified of the existence of that right.

[121] *42 U.S.C. § 10607*(c)(2) (2006) (emphasis added).

[122] See Attorney General Guidelines, supra note 52, at 7-8, 26-28.

already be providing reasonable protection for a victim before an offender is indicted, regardless of how the ***CVRA*** is interpreted. [123]

The VRRA, however, does not contain a right to confer and a right to fair treatment and respect for the victim's dignity. Therefore, if victims are going to receive these statutory rights before trial, these rights must be found in the ***CVRA***. With regard to the ***CVRA*** provision that victims have the "reasonable right to confer with the attorney for the Government in the case," [124] OLC contends that "the phrase "in the case' implies the pendency of a judicial proceeding." [125] To bolster its conclusion, OLC then cites Black's Law Dictionary, which includes among its several definitions of the word "case" the definition "a civil or criminal proceeding." [126] But OLC does not acknowledge that Black's Law Dictionary also defines and exemplifies a "case" more broadly as a "criminal investigation <the **[*82]** Manson case>." [127] Thus, Black's Law Dictionary does not help resolve the dispute as to which of the two meanings should be used, as there are clearly differing meanings. While OLC's reading may be a permissible one, so is a pro-victim reading.

OLC also turns to the ***CVRA***'s legislative history to bolster its conclusion. But, here again, its analysis is misleading. OLC relies on a passage from Senate floor colloquy between Senators Jon Kyl and Dianne Feinstein regarding the ***CVRA***'s scope. In OLC's recounting of the legislative history, the floor statements "emphasize that the right to confer relates to the conduct of criminal proceedings after the filing of charges." [128] For instance, OLC quotes Senator Kyl stating that "under this provision, victims are able to confer with the Government's attorney about proceedings after charging." [129]

This is a truncated and deceptive description of the legislative history, so much so that Senator Kyl sent an angry letter to Attorney General Eric Holder complaining about the distortion. On June 6, 2011, the Senator wrote to "express [his] surprise that [OLC is] so clearly quoting [his] remarks out of context." [130] Senator Kyl then went on to observe that the colloquy began by noting that the right to confer "is intended to be expansive." [131] The Senator further discussed various "examples" of when the right to confer applied, including "any critical stage or disposition of the case. The right, however, is not limited to these examples." [132] It was against that backdrop that Senator Kyl gave the example of conferring about proceedings "after charging."

In his letter to Attorney General Holder, Senator Kyl also noted that he had:

made clear that crime victims had rights under the ***CVRA*** even before an indictment is filed. For example, … I made clear that crime victims had a right to consult about both "the case' and "case proceedings' - i.e., both about how the case was being handled before being filed in court and then later how the case was being handled in court "proceedings.' [133]

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[123] Exactly what "reasonable protection" means, however, remains uncertain. See generally Mary Margaret Giannini, Redeeming an Empty Promise: Procedural Justice, the Crime Victims' Rights Act, and the Victim's Right to Be Reasonably Protected from the Accused, *78 Tenn. L. Rev. 47 (2010)* (suggesting the right has not been adequately defined and proposing ways to do so).

[124] *18 U.S.C. § 3771*(a)(5).

[125] OLC ***CVRA*** Rights Memo, supra note 2, at 8.

[126] Id. (citing Black's Law Dictionary, supra note 59, at 243).

[127] Black's Law Dictionary, supra note 59, at 244.

[128] OLC ***CVRA*** Rights Memo, supra note 2, at 9.

[129] Id. (emphasis added) (quoting 150 Cong. Rec. 7302 (2004) (statement of Sen. Jon Kyl) (internal quotation marks and citation omitted).

[130] Letter from Jon Kyl, supra note 3.

[131] Id. (quoting 150 Cong. Rec. S4260, S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Dianne Feinstein)).

[132] Id.

[133] Id.

Senator Kyl further commented that he had discussed the ***CVRA***'s potential application in grand jury proceedings, an application that required the Act **[*83]** to extend rights before indictment. [134] Thus, if anything, the legislative history does not support OLC's conclusion - it contradicts it. [135]

OLC should have had no doubt as to the intent of Senator Kyl and his cosponsors at the time of the Act's passage. Shortly after shepherding the ***CVRA*** through the Congress, Senator Kyl cowrote a law review article about the Act. [136] In that article, he directly indicated that the ***CVRA*** applies before charges are filed. Senator Kyl and his coauthors wrote:

While most of the rights guaranteed by the ***CVRA*** apply in the context of legal proceedings following arrest and charging, other important rights are triggered by the harm inflicted by the crime itself. For example, the right to be treated with fairness, the right to be reasonably protected from the accused (who may qualify as the accused before his arrest), and the right to be treated with respect for the victim's dignity and privacy each may arise without regard to the existence of legal proceedings. [137]

Remarkably, OLC cited Senator Kyl's law review article (in a footnote), but then concluded without explanation that the ***CVRA*** cosponsor's views were for some reason different than Congress's. [138]

OLC also appears to acknowledge that its interpretation of the ***CVRA*** could well contradict what it describes as prosecutorial "good practice." [139] OLC noted that some Justice Department components (for example, the Environmental and Natural Resources Division) had advocated that the right to confer should apply during pre-charging plea discussions. [140] OLC then acknowledged that limiting the right to confer until after formal charging could "reduce the impact of a victim's participation in subsequent court proceedings." [141] OLC attempted to dodge this problem by explaining: "The question before us, though, is not whether it would be advisable as a matter of good practice … for Government attorneys to confer with victims pre-charge when appropriate … ." [142] OLC then explained that even under its narrow interpretation of the statute, "the ***CVRA*** would still ensure that **[*84]** the victim has an opportunity to be heard by the court, and by the Government, before the court accepts the plea." [143]

But OLC failed to recognize that its interpretation of the ***CVRA*** rendered the right to be heard a nullity in many important cases - including, notably, the Epstein case. [144] Where prosecutors and defense attorneys work out a nonprosecution agreement that agreement will never be presented to a court for review. Thus, in cases where the need for victim participation may be the greatest - that is, in cases where the Government is considering never filing any charges - OLC's interpretation would bar victims from having any rights at all.

Even in situations where a prosecutor works out a plea agreement, OLC's interpretation is problematic. As OLC recognizes, prosecutors and defense counsel commonly work out pre-indictment plea agreements (particularly in white-collar cases), under

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[134] Id.

[135] Attorney General Holder never sent a response to Senator Kyl's letter. But Assistant Attorney General Ronald Weich sent a belated response. Letter from Ronald Weich, Assistant Att'y Gen., to Jon Kyl, U.S. Sen. (Nov. 3, 2011) (on file with authors). That response did not address Senator Kyl's concern that his remarks were being quoted out of context.

[136] See generally Kyl et al., supra note 19.

[137] Id. at 594.

[138] OLC ***CVRA*** Rights Memo, supra note 2, at 8 n.7.

[139] Id. at 10.

[140] Id. at 9 (citations omitted) (discussing an interdepartmental memorandum addressing this question).

[141] Id. at 10.

[142] Id.

[143] Id.

[144] The OLC opinion was publicly released on May 20, 2011. Perhaps not coincidentally, this release date was shortly before the Government filed its response in the Epstein case.

which a defendant will plead guilty to certain charges. [145] Then, the parties jointly present to the district court a criminal "information" (that is, a recitation of the charges drafted by the prosecutor but never presented to the grand jury [146]) and a plea agreement, asking the court to file the criminal information and simultaneously accept the guilty plea. As the OLC memorandum acknowledges, a crime victim would have the right to object to the plea agreement, because the ***CVRA*** gives crime victims the "right to be reasonably heard" at any public proceedings involving a plea. [147] But under OLC's interpretation of the ***CVRA***, a crime victim has no right to notice of court hearings until the charges are filed. Thus, if the information and plea are filed simultaneously, as is often the case, two scenarios are possible. A victim could have no prior right to notice of the proceeding at which the plea was being accepted, or alternatively (if the act of filing the information in the course of accepting a plea triggers a notification right), the district court would be required to stop in the middle of proceedings and ensure that notification was belatedly provided. Of course, these difficulties are all avoided if the right to confer is properly construed as attaching before charges are filed, such as during plea negotiations between prosecutors and defense attorneys.

[*85] More importantly, extending the right in this fashion will not be unduly burdensome for federal prosecutors. After the OLC memorandum was made public, the Department amended the Attorney General Guidelines for Victim and Witness Assistance to require prosecutors to make reasonable efforts toward a goal of providing victims with a meaningful opportunity to offer their views before plea agreements are formally reached. [148] "In circumstances where plea negotiations occur before a case has been brought, Department policy is that this should include reasonable consultation prior to the filing of a charging instrument with the court." [149] Thus, Department policy already extends pre-charging rights to victims. The ***CVRA*** should be understood as having the same scope.

OLC also notes that the ***CVRA*** right "to be treated with fairness and with respect for the victim's dignity and privacy" is a right that could apply before charges are filed. [150] Indeed, OLC is forced to concede (as district courts have recognized) that the "right to be treated with fairness and with respect for the victim's dignity and privacy may apply with great force during an investigation, before any charging instrument has been filed." [151]

OLC nonetheless maintains that the right to fairness only applies after charges have been filed. OLC relies on the canon of statutory construction noscitur a sociis, meaning that words are known by their companions, [152] for its interpretation of the ***CVRA***. OLC argues that because the other seven enumerated rights are limited to post-charging situations, the eighth right should be as well. Of course, this argument assumes that OLC's construction of the other seven rights is correct - a point very much in dispute. [153] If, for example, the right to confer applies before charges are filed, then presumably noscitur a sociis would cut the other way - the right to fairness should likewise be construed as applying before charges are filed.

Moreover, OLC omits from its discussion of the fairness provision any assessment of the ***CVRA***'s purposes. In construing a statute, a court must consider the "purpose and context" of the statute. [154] In describing the fairness provision, Senator Kyl

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[145] See OLC ***CVRA*** Rights Memo, supra note 2, at 9 (acknowledging the potential effect of the ***CVRA*** on plea negotiations).

[146] See *Fed. R. Crim. P. 7(b)*.

[147] *18 U.S.C. § 3771*(a)(4) (2012); OLC ***CVRA*** Rights Memo, supra note 2, at 6-7.

[148] Attorney General Guidelines, supra note 52, at 41-42.

[149] Id. at 41.

[150] OLC ***CVRA*** Rights Memo, supra note 2, at 10 (quoting *18 U.S.C. § 3771*(a)(8)).

[151] Id. (quoting United States v. BP Products North America Inc., No. H-07-434, 2008 WL 501321, at 11 (S.D. Tex. Feb. 21, 2008) (internal quotation marks omitted)).

[152] Id. at 11.

[153] See supra Part III.A.

[154] *Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1331 (2011).*

emphasized that it conferred a "broad" **[*86]** right. [155] The reason for adopting such a broad right was that "too often victims of crime experience a secondary victimization at the hands of the criminal justice system. This provision is intended to direct Government agencies and employees, whether they are in the executive or judiciary branch, to treat victims of crime with the respect they deserve." [156] OLC's failure to consider the purposes underlying the ***CVRA*** is a glaring oversight.

OLC never attempts to explain why the ***CVRA***'s drafters would want victims to have a right to fair treatment once criminal charges were filed but possess no such right before the filing of criminal charges. Clearly, many victims can and do suffer secondary victimization during criminal investigations, such as when sexual assault victims are treated inappropriately by law enforcement agents. [157] It would contradict the purpose of preventing victim mistreatment in the criminal justice system to artificially limit the right to fairness to the point at which charges are filed. The right to fairness logically applies at all stages of the criminal justice process.

C. OLC'S INEFFECTIVE RESPONSE TO THE ***CVRA***'S COVERAGE AND VENUE PROVISIONS

At the end of its memorandum, OLC finally discusses what it identifies as the two strongest arguments for construing the ***CVRA*** as applying before charging: the coverage provision and the venue provision. OLC acknowledges, as it must, that the ***CVRA***'s coverage extends to any federal employee engaged in "the detection, investigation or prosecution of crime." [158] Such employees "shall make their best efforts to see that crime victims are notified of, and accorded, the rights" afforded by the statute. [159] Notably, this duty applies to individuals not just in the Justice Department (where all federal prosecutors are located) but other agencies as well, such **[*87]** as environmental crimes investigators in the Environmental Protection Agency (EPA). [160]

This coverage provision would seem to answer any lingering question about whether the ***CVRA*** applies before charging. In directing that federal employees engaged in the "detection" and "investigation" of crime must respect victims' rights, Congress wanted broad rights extending beyond just the prosecution of a case. As the district court concluded in the Epstein case, this provision "surely contemplates pre-charge application of the ***CVRA***." [161]

OLC gamely maintains, however, that Congress was simply trying to provide that federal law enforcement agents should provide rights to victims when a criminal case moves to its prosecution phase. OLC noted the uncontroversial point that law enforcement agents "often develop a relationship of trust with crime victims during the investigation that continues as they assist crime victims in negotiating active criminal proceedings." [162] OLC then asserted:

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[155] 150 Cong. Rec. 7303 (2004) (statement of Sen. Jon Kyl).

[156] Id.

[157] See Susan Estrich, Real Rape 50-51 (1987) (describing how a rape victim's sexual history may be used against her in court proceedings); Beloof, supra note 38, at 309-10 (collecting examples of victims' issues that arise during the investigative process); see also *President's Task Force on Victims of Crime, Final Report, supra* note 10, at 57-62 (making recommendations for how police should treat victims during the criminal justice process).

[158] OLC ***CVRA*** Rights Memo, supra note 2, at 15 (quoting *18 U.S.C. § 3771*(c)(1) (2012)) (internal quotation marks omitted).

[159] *18 U.S.C. § 3771*(c)(1).

[160] See Kyl et al., supra note 136, at 615 ("Notice should be given to the fact that it applies not just to the Department of Justice, but to all "departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime.'" (citation omitted)).

[161] *Does v. United States, 817 F. Supp. 2d 1337, 1342 (S.D. Fla. 2011).*

[162] OLC ***CVRA*** Rights Memo, supra note 2, at 15.

Given this continuing active role that agents typically play during criminal prosecutions, we find the fact that the ***CVRA*** assigns responsibility to them, together with the attorney for the Government, to … accord them their rights under the ***CVRA*** to be entirely consistent with our conclusion that those rights arise only once the Government has initiated criminal proceedings. [163]

But OLC's contorted position never explains why Congress found it necessary to break out three separate phases of the criminal justice process: the "detection," "investigation," and "prosecution" of crime. If the congressional intent was simply to cover, for example, FBI agents or EPA agents during the post-charging phase of a case, it could have simply omitted those words from the ***CVRA***. An FBI agent, for example, would be engaged in the "prosecution" of the case when assisting the victim after the formal filing of charges. On OLC's reading of the statute, the words "detection" and "investigation" become meaningless, contrary to the well-known canon of construction verba cum effectu sunt accipienda, which means that, if possible, every word and every provision is to be given effect. [164]

OLC also suggests that the "most significant" argument supporting pre-charging application of rights is the venue provision, which allows **[*88]** crime victims to assert ***CVRA*** rights "in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred." [165] The Department contends that this language refers quite narrowly to the "period of time between the filing of a complaint and the initiation of formal charges." [166] In support of its position, the Department cites a Fourth Circuit case interpreting the ***Sixth Amendment*** right to counsel, which held that a "prosecution" for purposes of that ***Amendment*** does not begin when a criminal complaint is filed. [167] In OLC's view, the venue provision's direction that victims should assert rights when "no prosecution is underway" applies only to the limited time between when the Government files a complaint against a defendant and some later point when the "prosecution" actually begins. OLC notes that the filing of a complaint triggers an initial appearance, where crime victims can have important interests at stake, such as the right to be heard about a defendant's release on bail. OLC believes it is only to such post-complaint, yet pre-indictment, proceedings (i.e., the initial appearance) that the venue provision's "no-prosecution-underway" language covers.

As a preliminary matter, OLC's interpretation of the word "prosecution" in the Department's narrow construction of the venue provision is a twisted one, at odds with the way that term is conventionally used. The filing of a complaint is typically viewed as the start of a criminal prosecution. For example, the leading criminal procedure hornbook states that "with the filing of the complaint, the arrestee officially becomes a "defendant' in a criminal prosecution." [168]

Moreover, having specifically rejected the filing of the criminal complaint as the starting point for a "prosecution" within the ***CVRA***'s venue provision, OLC refuses to consider the implications of its alterative starting point: the formal filing of an indictment. OLC states that "a prosecution of a felony must commence with the return of an indictment by a grand jury," citing the Federal Rules of Criminal Procedure. [169] Yet OLC does not pause to recognize that, while felonies proceed by way of indictment, misdemeanors can proceed not only by indictment but also by complaint. [170] The ***CVRA*** draws no distinction between misdemeanor and **[*89]** felony offenses, broadly extending its protections to victims of any federal offense. [171] Thus, under OLC's interpretation that the filing of a complaint does not trigger the ***CVRA***, many victims who are entitled to

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[163] Id.

[164] See, e.g., *Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979).*

[165] OLC ***CVRA*** Rights Memo, supra note 2, at 14 (quoting *18 U.S.C. § 3771*(d)(3) (2012)).

[166] Id.

[167] Id. (citing *United States v. Alvarado, 440 F.3d 191, 200 (4th Cir. 2006)).*

[168] Wayne R. LaFave et al., Criminal Procedure § 1.2(g), at 11 (5th ed. 2009) (emphasis added).

[169] OLC ***CVRA*** Rights Memo, supra note 2, at 14 (citing *Fed. R. Crim. P. 7(a)(1)*).

[170] *Fed. R. Crim. P. 58(b)(1)* ("The trial of a misdemeanor may proceed on an indictment, information, or complaint." (emphasis added)).

[171] See *18 U.S.C. § 3771*(e) (2012).

CVRA protections - i.e., victims of misdemeanor offenses prosecuted by way of complaint - will never have proper venue to assert those rights because, according to OLC's strained argument, no prosecution ever started in their cases.

Even limiting the focus to felony cases, OLC misleadingly describes the ***Sixth Amendment*** case law. It is not immediately clear why one would look to the right to counsel to determine the breadth of the term "prosecution" in the ***Sixth Amendment***. The right to counsel is not the only right found in that ***Amendment***. The ***Amendment*** also extends, for example, a right to a speedy trial in all criminal "prosecutions." [172] The case law on the speedy trial right makes clear that the right "may attach before an indictment and as early as the time of arrest and holding to answer a criminal charge." [173]

In any event, the right to counsel cases are quite clear in providing that a ***Sixth Amendment*** "prosecution" can (and often does) begin well before an indictment. [174] The Supreme Court has directly held that the ***Sixth Amendment***'s right to counsel attaches "at or after the time that judicial proceedings have been initiated against [a person] - "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" [175] Thus, under this controlling precedent, some earlier point in time before indictment is the triggering point of a ***Sixth Amendment*** "prosecution."

The cases that OLC cites are not to the contrary. It is true that some federal appeals courts have stated that the mere filing of a criminal complaint does not trigger a ***Sixth Amendment*** right to counsel. [176] But there is a split of authority on this question, as OLC acknowledges in a footnote. [177] More importantly for purposes of this Article, the cases holding **[*90]** that the mere filing of a complaint does not start a ***Sixth Amendment*** prosecution also make clear that a later court hearing would start such a prosecution. For instance, in the Fourth Circuit case cited by OLC, United States v. Alvarado, the court reasons that "the main reason a law enforcement officer files [] a complaint is to establish probable cause for an arrest warrant. The criminal process is still in the investigative stage, and the adverse positions of government and defendant have yet to solidify." [178] Relying on that reasoning, the Fourth Circuit refused to find that the right to counsel had attached merely because a police officer had filed a complaint to get an arrest warrant. But the Fourth Circuit distinguished that situation from "the initiation of adversary judicial proceedings against the defendant." [179] An initial appearance would be such an adversary proceeding - i.e., it would be a "prosecution" under the ***Sixth Amendment***. In light of this, OLC's position that the ***CVRA***'s venue provision's "no-prosecution-underway" reference covers proceedings, such as an initial appearance, does not work.

The only sensible way to construe the ***CVRA***'s venue provision is to read it as conveniently dividing criminal cases into two phases: a prosecution phase and an earlier investigative phase when "no prosecution is under way." [180] Senator Kyl, for

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[172] ***U.S. Const. amend. VI.***

[173] *United States v. Gouveia, 467 U.S. 180, 190 (1984)* (quoting *United States v. MacDonald, 456 U.S. 1, 6-7 (1982))* (internal quotation marks omitted).

[174] See, e.g., *Texas v. Cobb, 532 U.S. 162, 172-73 (2001).*

[175] *Brewer v. Williams, 430 U.S. 387, 398 (1977)* (quoting *Kirby v. Illinois, 406 U.S. 682, 689 (1972)).*

[176] See, e.g., *United States v. Alvarado, 440 F.3d 191, 196 (4th Cir. 2006).*

[177] OLC ***CVRA*** Rights Memo, supra note 2, at 14 n.15 (citing *Hanrahan v. United States, 348 F.2d 363, 366 n.6 (D.C. Cir. 1965));* see Wayne R. LaFave et al., Criminal Procedure § 6.4(e), at 670 (3d ed. 2007) ("There is an apparent split of authority on the question of whether the filing of a complaint is alone enough to give rise to a ***Sixth Amendment*** right to counsel, though the difference probably is explainable by the fact that this document is used for multiple purposes."); see also *Felder v. McCotter, 765 F.2d 1245, 1248 (5th Cir. 1985)* (citing Texas law).

[178] *Alvarado, 440 F.3d at 200* (citations omitted) (internal quotation marks omitted).

[179] Id. (quoting *United States v. Gouveia, 467 U.S. 180, 187 (1984)).*

[180] *18 U.S.C. § 3771*(d)(3) (2012).

instance, has noted that if there are any doubts about how to construe the ***CVRA***, this venue provision "sweeps them away." [181] Once again, the language that Congress used leads inexorably to the conclusion that the ***CVRA*** extends rights to victims before the filing of criminal charges.

IV. When Pre-charging Rights Attach Under the ***CVRA***

The zeal with which OLC argues against applying ***CVRA*** rights before charging raises the question of why it protests so much. Although OLC never articulated this concern, perhaps OLC worried that pre-charging rights would be difficult to administer. Such concerns should evaporate with a workable construction of when pre-charging rights attach. In this Part, we propose such a construction, suggesting that ***CVRA*** rights should attach when substantial evidence exists that a specific person has been directly and proximately harmed as the result of a federal crime. This approach appears to already be the method that the Department is taking, as **[*91]** it has extended many rights to victims before the formal filing of criminal charges as a matter of internal policy. [182] This approach appears to be workable, as a number of states extend rights to victims during the investigative process. [183]

A. A TEST FOR DETERMINING WHEN RIGHTS ATTACH

As explained in the earlier Parts of this Article, the ***CVRA*** clearly envisions that crime victims would have rights in the criminal justice process before the return of indictments or the filing of criminal complaints. The question then as to how much earlier in the process crime victims have rights naturally arises. Does the ***CVRA*** apply one second after a federal crime has been committed? Or does it apply at some later point during an investigation?

This issue was nicely framed by the U.S. District Court for the Eastern District of New York in a securities fraud case. In the first indictment underlying the case, the charged crime did not include various victims. A later superseding indictment broadened the charges to include those missing individuals. When they brought a suit under the ***CVRA***, the court noted that "quite understandably, movants perceive their victimization as having begun long before the government got around to filing the superseding indictment." [184] The court, however, explained that there must be "logical limits" to crime victims' rights before the filing of charges. [185] The court noted:

For example, the realm of cases in which the ***CVRA*** might apply despite no prosecution being "underway,' cannot be read to include the victims of uncharged crimes that the government has not even contemplated. It is impossible to expect the government, much less a court, to notify crime victims of their rights if the government has not verified to at least an elementary degree that a crime has actually taken place, given that a corresponding investigation is at a nascent or theoretical stage. [186]

The logical limits that the ***CVRA*** envisions could come from how the Justice Department interacts with criminals during the investigation of a crime. Crime victims' rights advocates are fond of saying that victims "only want to be treated like criminals" - that is, they simply want to have the same kinds of rights as criminals receive, such as the right to be notified **[*92]** of court hearings and to attend those hearings. [187] So it is instructive to notice that the Justice Department policy is to extend certain rights to suspected criminals during certain points in the investigative process. That policy might provide guidance on when crime victims' rights would attach.

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[181] Kyl et al., supra note 19, at 594.

[182] See, e.g., Attorney General Guidelines, supra note 52, at 41-42 (discussing the right to confer regarding plea bargains).

[183] See infra Part III.D.

[184] *United States v. Rubin, 558 F. Supp. 2d 411, 419 (E.D.N.Y. 2008).*

[185] Id.

[186] Id.

[187] See, e.g., Cassell, supra note 15, at 1376-85 (describing the rationale underpinning state victims' rights statutes).

Of particular interest here is the Department's policy for grand jury subpoenas issued to a "target" of a criminal investigation. When such a target is subpoenaed to testify before a grand jury, the Department of Justice will advise that target of his rights, such as the right to refuse to answer any question that might be incriminating. [188] The Department of Justice defines a "target" of a criminal investigation as "a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." [189]

If the Department's investigation has coalesced sufficiently so that it can provide notice of rights to putative defendants, it should likewise be in a position to provide notice of rights to that defendant's victims. Combining the Department's definition of "target" with the ***CVRA***'s coverage and definition-of-victim provisions produces a formulation whereby ***CVRA*** rights attach in (at least) the following circumstances:

CVRA rights attach when an officer or employee of the Department of Justice or any other department or agency of the United States engaged in the detection, investigation, or prosecution of crime has substantial evidence that an identifiable person has been directly and proximately harmed as a result of the commission of a federal offense or an offense in the District of Columbia, and in the judgment of the officer or employee, that person is a putative victim of that offense.

This formulation borrows from the ***CVRA***'s coverage provision [190] to define the relevant universe of substantial evidence as that in the possession of the Justice Department or other federal agencies. For instance, if state law enforcement officers are investigating a bank robbery, the fact that the robbery might also be prosecuted federally [191] does not make the teller at the bank a federal "victim" of the crime until evidence regarding the crime comes into the possession of a federal agency. The formulation also tracks the ***CVRA***'s definition of "victim" in limiting the universe of potential **[*93]** victims to those who have been "directly and proximately harmed." [192] Finally, the formulation requires some federal officer or employee to evaluate the evidence and reach the conclusion that a federal offense has been committed that harmed the person in question. This determination responds to the observation by the District Court for the Eastern District of New York that the ***CVRA*** "cannot be read to include the victims of uncharged crimes that the government has not even contemplated." [193] At the same time, such a formulation obviously does not require the filing of formal criminal charges, or even the preparation of formal criminal charges. Instead, all that is required is for the Department to recognize that a person is a putative victim of a federal offense, just as all that is required for the mailing of a target letter to a subpoenaed suspected criminal, is recognition that he is a putative defendant in a federal case.

B. APPLYING THE TEST TO THE EPSTEIN CASE

To illustrate how the test would operate, it is useful to examine the facts of the Epstein case. Applying the proposed test to that case produces straightforward answers, which suggests that the test would be workable in practice.

From 2001 to 2007, Jeffrey Epstein sexually abused more than thirty minor girls in his mansion, including Jane Doe Number One and Jane Doe Number Two. [194] Initially, of course, his acts of abuse were secret, unknown to law enforcement. During that period of time, the victims would not have had rights under the ***CVRA***.

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[188] Criminal Resource Manual, supra note 87, § 9-11.151.

[189] Id.

[190] *18 U.S.C. § 3771*(e) (2012).

[191] Id. § 2113.

[192] See id. § 3771(e).

[193] *United States v. Rubin, 558 F. Supp. 2d 411, 419 (E.D.N.Y. 2008).*

[194] As above, see supra notes 34-41 and accompanying text, this part of the Article draws on the factual allegations made by the victims in this case - allegations that Epstein has not intervened to dispute. See Jane Doe Motion, supra note 40, at 3-23.

In 2006, Epstein's acts of abuse came to the attention of the Palm Beach Police Department, which began investigating the case. [195] At this point, once again, the victims would not have had rights under the proposed ***CVRA*** test. The ***CVRA*** extends rights in the federal criminal justice process. A state investigation does not trigger the ***CVRA*** (although it may trigger certain state law protections, as discussed below). [196]

At some point in 2006, the Palm Beach Police Department asked the FBI to investigate Epstein on federal sex offenses, such as using a means of **[*94]** interstate communication in connection with sex offenses and traveling in interstate commerce for the purpose of engaging in illicit sexual conduct with minors. [197] The local police provided the FBI with information, which the FBI then investigated. Following an investigation, the FBI determined that the allegations of abuse against Epstein were credible, and it presented the case to the U.S. Attorney's Office for the Southern District of Florida. In 2007, the Office contacted counsel for Jeffrey Epstein and began negotiating a resolution of the case against him. [198]

Under our proposed test, the victims would not have had ***CVRA*** rights the first moment that the FBI became aware of Epstein's possible commission of sex offenses. But after the FBI developed substantial evidence of those sex offenses, identified victims of those offenses, and presented the case to the appropriate U.S. Attorney's Office for prosecution, ***CVRA*** rights would have attached. Accordingly, the FBI would have been required to notify the identified victims of their rights under the ***CVRA*** (as well as under the VRRA). From that point forward in the case, the victims would have had ***CVRA*** rights, such as the right to fair treatment and the right to confer with prosecutors. In this case, the victims would have had the right to confer with prosecutors about the nonprosecution agreement that they ultimately reached with Epstein. [199]

C. CURRENT DEPARTMENT POLICY ON PRE-CHARGING RIGHTS

One objection that might be made to the formulation offered above is that it might unduly burden federal law enforcement officers and prosecutors, who would need to make judgment calls about when an investigation has coalesced to the point where "victims" are in existence, "substantial evidence" has been collected, and notice of rights has to be provided. Any such objection would be ill-founded, though, as it does not appear that implementing such an approach would be difficult. [200] Presumably the Justice Department has already been providing such rights in at least Texas, Louisiana, and Mississippi to comply with the Fifth **[*95]** Circuit's 2008 ruling in In Re Dean, which held that the ***CVRA*** extends rights to victims before defendants are charged. [201] We have not seen any reports that providing the rights has been difficult.

Perhaps the reason for the lack of any reported difficulty is that the Department's current policy on crime victims' rights already requires notices to victims during investigations. The Justice Department has promulgated the Attorney General Guidelines for Victim and Witness Assistance, the latest edition of which is from May 2012. The Guidelines discuss crime victims' rights under both the ***CVRA*** and the earlier VRRA. Because of the OLC memorandum discussed above, the Guidelines limit ***CVRA***

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[195] See Probable Cause Affidavit, Palm Beach Police Department: Police Case No. 05-368(1) (May 1, 2006), available at *http://goo.gl/fAPFw5*; see also Statement of Undisputed Facts, Epstein v. Rothstein, No. 50 2009 CA 040800XXXXMBAG (Fla. Cir. Ct. Sept. 22, 2010), available at *http://goo.gl/DzMbe8*.

[196] See supra notes 178-95 and accompanying text as well as infra Part IV.D.

[197] See *18 U.S.C.§§2422*(b), 2423(b), (e) (2012).

[198] A more substantial summary of the case is available in case filings. See Jane Doe Motion, supra note 40.

[199] See supra Part II.

[200] This Article does not discuss mass victim cases in which notice needs to be provided to hundreds of victims. But in such situations, the ***CVRA*** already provides for "reasonable" alternative procedures. *18 U.S.C. § 3771*(d)(2) (2012). The Department of Justice, for example, has used websites to provide notice in terrorism cases to large numbers of victims. See, e.g., United States v. Ingrassia, No. CR-04-0455ADSJO, 2005 WL 2875220, at 4 (E.D.N.Y. Sept. 7, 2005); Criminal Division's Victim Notification Program, U.S. Dep't of Justice, *http://goo.gl/6H6IEk* (last visited Dec. 4, 2013).

[201] *527 F.3d 391 (5th Cir. 2008).*

rights until after the time "when criminal proceedings are initiated by complaint, information, or indictment." [202] The Department, however, provides hortatory guidance that Justice Department employees shall make "best efforts" to notify crime victims about their ***CVRA*** rights "as early in the criminal justice process as is feasible and appropriate." [203]

Of greater interest, however, is the Department's mandatory policy regarding notification regarding crime victim services under the VRRA. The Guidelines explain how "Department responsibilities to crime victims begin as soon as possible after the detection of a crime at which they may be undertaken without interfering in the investigation." [204] The Guidelines then direct the appropriate "responsible official" to provide crime victims with "information about services available to them." [205] This information must be provided at "the earliest opportunity after detection of a crime at which it may be done without interfering with an investigation." [206]

The Department appears to have little difficulty implementing this requirement. Evidence of this fact comes from the Justice Department itself, which responded to the letter from Senator Kyl discussed earlier questioning why the Department was not applying the ***CVRA*** before charges were filed. [207] In its response, the Department noted that OLC had issued an opinion that the ***CVRA*** did not extend rights before the formal filing of charges. [208] "Even so," the Department explained, "the new AG Guidelines go further and provide that Department prosecutors should make **[*96]** reasonable efforts to notify identified victims of, and consider victims' views about, prospective plea negotiations, even prior to the filing of a charging instrument with the court." [209]

The Department also noted that it provided extensive pre-charging notifications to victims under the VRRA:

Pursuant to the Victims' Rights and Restitution Act of 1990 (VRRA), the Department identifies victims and provides to them service referrals, reasonable protection, notice concerning the status of the investigation, and information about the criminal justice process prior to the filing of any charges. The Department's investigative agencies provide such services to thousands of victims every year, whether or not the investigation results in a federal prosecution. [210]

Quantifying the scope of this undertaking with regard to one federal investigative agency, the Department explained:

The [FBI] alone reports that it provided more than 190,000 services to victims during the past fiscal year [FY 2011], including case status updates, assistance with compensation applications and referrals, and counseling referrals. From sexual assaults in Indian Country to child pornography and human trafficking to mass violence and overseas terrorism, FBI victim specialists provide much-needed immediate and ongoing support and information to victims. The FBI addresses victim safety issues when needed, providing on-scene response and crisis intervention services in thousands of investigations. With regard to sexual assault victims, FBI personnel arrange for and often accompany victims to forensic sexual assault medical examinations and provide assistance with HIV/STD testing. [211]

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[202] Attorney General Guidelines, supra note 52, at 8.

[203] Id. at 35.

[204] Id. at 26 (citing *42 U.S.C. § 10607*(b) (2006)).

[205] Id. at 29 (citing *42 U.S.C. § 10607*(b)(2)). Elsewhere, the Guidelines define the official who is responsible as the appropriate federal law enforcement officer during the investigation of the crime or the U.S. Attorney once charges have been filed. Id. at 25-26.

[206] Id. at 29.

[207] See supra notes 130-33 and accompanying text.

[208] Letter from Ronald Weich, supra note 135, at 2.

[209] Id.

[210] Id. at 2-3.

[211] Id. at 3.

In view of the Department's existing notifications and provision of services before charges are filed under the VRRA, it is hard to conceive how any viable claim could be made that it would be difficult to provide similar rights under the ***CVRA***. The four rights that would be potentially in play before charging would be the right to reasonable protection, the right to fair treatment, and the right to confer with prosecutors, along with the predicate right to notice of these rights. [212] The VRRA already requires the Department to provide reasonable protection, so this would not be an expanded obligation. [213] Similarly, the Guidelines already require prosecutors to confer with victims about plea agreements (the most common situation where victims want to confer), so it is hard to imagine how extending this right would create any undue burden. [214] Additionally, the right to "fair treatment" could only be a problem if the Department **[*97]** wanted to treat victims unfairly. Given its repeated and professed commitment to crime victims, here too this obligation should not be burdensome. And finally, with regard to providing notice of ***CVRA*** rights to victims, the fact that the Department currently provides notice of VRRA rights indicates that it should not be difficult to provide notice of ***CVRA*** rights as well.

Indeed, it is possible that the Department's notification letters under the VRRA already include this information. Interestingly, in the Epstein case, the FBI notified Jane Doe Number One and Jane Doe Number Two that they had rights in the criminal justice process. As early as June 7, 2007 - more than three months before it concluded a nonprosecution agreement with Epstein - the U.S. Attorney's Office sent a notice to Jane Doe Number One stating "your case is under investigation." [215] The notice also informed Jane Doe Number One that "as a victim and/or witness of a federal offense, you have a number of rights." [216] Among the rights that the U.S. Attorney's Office told Jane Doe that she possessed was "the reasonable right to confer with the attorney for the United States in the case." [217] Of course, she would not have had those rights if she was not covered by the ***CVRA***. The FBI therefore apparently assumed that the ***CVRA*** already applied in the Epstein case. It was only later, when the matter went into litigation, that the Department of Justice reversed course. This change in course underscores the problems arising out of the OLC memorandum and the Department's current interpretation of the ***CVRA***.

D. STATE LAW EXTENSION OF PRE-CHARGING RIGHTS

The focus of this Article so far has been crime victims' rights in the federal system. But in concluding, it is instructive to note how a number of states offer parallel rights for crime victims, including the right to confer with prosecutors. In fact, several states have extended such rights prior to formally filing of charges against defendants - without reported difficulty, so far as we are aware. This confirms our inference that extending ***CVRA*** rights to crime victims before the formal filing of criminal charges is both feasible and desirable.

A general overview of state laws illustrates the broad protections afforded to victims in state criminal justice systems. Nearly two-thirds of states have adopted constitutional provisions to protect victims throughout **[*98]** the criminal justice process. [218] Moreover, every state has adopted a statute that either enforces its constitutional ***amendment*** or creates independent statutory rights for crime victims. [219] As a result, state legislatures and state employees have attempted to give victims a voice in the criminal justice process across the country.

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[212] *18 U.S.C. § 3771*(a)(1), (5), (8), (c)(1) (2012).

[213] See *42 U.S.C. § 10607*(c)(2) (2006).

[214] See Attorney General Guidelines, supra note 52, at 41-42.

[215] Letter from A. Marie Villafana, Assistant U.S. Att'y, to Jane Doe #1 (June 7, 2007), reprinted in Jane Doe Motion, supra note 40, at ex. C.

[216] Id.

[217] Id.

[218] See Victims' Rights Laws by State, Nat'l Crime Victim L. Inst. (Oct. 17, 2013), *http://goo.gl/pdDx1w* (listing and linking to state laws and constitutional ***amendments***).

[219] See LaFave et al., supra note 168, § 21.3(f), at 1041-42.

Notably, while the strength of these rights varies from state to state, [220] nearly forty states require the prosecuting attorney to notify or confer with the victim regarding plea negotiations. [221] Several jurisdictions involve the victim in the charging decision. [222] In some states, law enforcement and prosecutors must involve the victim at any "critical" [223] or "crucial" [224] stage of the criminal proceeding; and in a minority of jurisdictions, the judge must ascertain whether the prosecutor has afforded the victim statutory protections prior to accepting a plea agreement. [225]

The general contours of state provisions suggest that several state governments have recognized the value in informing victims of their rights and involving them in the criminal process prior to the formal filing of charges. [226] Indeed, a brief look at the statutory protections illustrates the extent to which states have attempted to afford protections to victims long before the formal filing of charges.

[*99] For example, Arizona has adopted a constitutional ***amendment*** and statutes that expansively protect victims. Under Arizona law, the definition of victim hinges on whether a criminal offense has been committed, and the term "criminal offense" is defined as "conduct that gives a peace officer or prosecutor probable cause to believe" a crime has occurred. [227] In short, a victim's status does not hinge on the formal filing of charges but rather on the criminal conduct itself. [228] Arizona law enforcement personnel must give information to victims describing their rights as soon as possible, even if formal charges have not yet been filed, and a victim may request that the prosecutor discuss the disposition of the case, including "a decision not to proceed with a criminal prosecution, dismissal, plea, or sentence negotiations and pretrial diversion programs." [229] A victim may even pursue some rights if counts are dismissed. [230] Arizona courts have also permitted victims to invoke their rights in the context of civil forfeiture proceedings. [231]

Hawaii's victims' rights statute illustrates how a state has defined the term "case" more expansively than the limited definition advocated by the Department in order to facilitate victim participation. By statute in Hawaii, victims must, upon request, be informed of "major developments" in any felony case. [232] Along a similar vein, the prosecuting attorney must consult or

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[220] See generally Dean G. Kilpatrick et al., Nat'l Inst. of Justice, U.S. Dep't of Justice, The Rights of Crime Victims - Does Legal Protection Make a Difference? (1998), available at *http://goo.gl/EzH61S*.

[221] See Peggy M. Tobolowsky, Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime, 25 New Eng. J. on Crim. & Civ. Confinement 21, 64 & n.168 (1999) (citing to victims' rights statutes in Connecticut, Illinois, and Michigan, among others). Unfortunately, as some commentators have noted, the notice and conferral provisions in some states are ambiguous, and the absence of case law precludes a definitive understanding of the reach of the right in some jurisdictions. See LaFave et al., supra note 168, § 21.3(f), at 1041-42; see also, e.g., *Kan. Stat. Ann. § 74-7333(a)(5)* (2002) ("The views and concerns of victims should be ascertained and the appropriate assistance provided throughout the criminal process."). In some jurisdictions, the ambiguous use of an illustrative list could be read as suggesting that a particular right, such as conferral, hinges on formal charges. See, e.g., *Ky. Rev. Stat. Ann. § 421.500(6)* (LexisNexis Supp. 2012) (requiring consultation on "disposition of the case including dismissal, release of defendant pending judicial proceedings, any conditions of release, a negotiated plea, and entry into a pretrial diversion program," but failing to define "disposition" or "case").

[222] See Tobolowsky, supra note 221, at 59-60.

[223] E.g., *La. Rev. Stat. Ann.§§46:1842(2)*, *46:1844(K)* (2010).

[224] E.g., Fla. Const. art. I, § 16(b) (refraining from identifying the term).

[225] See LaFave et al., supra note 168, § 21.3(f), at 1041.

[226] See *Victims' Rights Laws by State, supra* note 218.

[227] *Ariz. Rev. Stat. Ann. § 13-4401(6)* (2010) (emphasis added); see *State ex rel. Thomas v. Klein, 150 P.3d 778, 780-81 (Ariz. Ct. App. 2007)* (noting the original version defined a criminal offense as a violation of a statute).

advise the victim about any plea negotiations. [233] Interestingly, however, the Hawaii legislature defined "major developments" as "arrest or release of the suspect by the police, case deferral by the police, referral to the prosecutor by the police, rejection of the case by the prosecutor, preliminary hearing date, grand jury date, trial and sentencing dates, and the disposition of the case." [234] The usage of the term "case" and the plain language of the provisions demonstrate that victims in the State of Hawaii are entitled to a notification right and a possible consultation right long before formal charges are filed.

[*100] Other states also expressly extend rights before the filing of charges. Colorado guarantees rights at "all critical stages of the criminal justice process[,]" which includes both the filing of charges and the decision to not file charges. [235] In Missouri, victims have the right:

on charged cases or submitted cases where no charge decision has yet been made, to be informed by the prosecuting attorney of the status of the case and of the availability [of different forms of compensation and assistance] and of any final decision by the prosecuting attorney not to file charges. [236]

In New Jersey, officials typically send a letter informing the victim "that the case has been referred to the prosecutors' office and explains and offers the services available from the country office of victim-witness advocacy." [237] Subsequent letters to the victim ensure that the victim has notice of a series of decisions long before indictment, [238] and the office actively solicits information in order to "help the prosecutor's office decide whether or not to prosecute a case." [239] Along a similar vein, the Massachusetts legislature included a provision that makes it clear that nothing should prevent a prosecutor from providing victim services to persons injured by the commission of a crime, even though a complaint or indictment has not yet been issued. [240]

In addition to extending rights before the filing of charges, several states require consultation before the prosecutor reaches a plea agreement with the defendant. For example, Idaho's statute provides that a victim must be given an opportunity "to communicate with the prosecution in criminal or juvenile offenses, and be advised of any proposed plea agreement by the prosecuting attorney prior to entering into a plea agreement in criminal or juvenile offenses involving crimes of violence, sex

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[228] Under Arizona law, the "rights and duties that are established by this chapter arise on the arrest or formal charging of the person or persons who are alleged to be responsible for a criminal offence against a victim." *Ariz. Rev. Stat. Ann. § 13-4402(A)* (2010) (emphasis added).

[229] *Ariz. Rev. Stat. Ann. § 13-4419(A)* (2010).

[230] See *Ariz. Rev. Stat. Ann. § 13-4402.01(A)*.

[231] It appears, however, that the criminal proceeding may have been parallel to the civil forfeiture proceeding. See *State v. Lee, 245 P.3d 919, 923-24 (Ariz. Ct. App. 2011).*

[232] *Haw. Rev. Stat. Ann. § 801D-4(a)(1)* (LexisNexis 2007).

[233] See id.

[234] Id. § 801D-2.

[235] Colo. Const. art. II, § 16a; ***Colo. Rev. Stat. § 24-4.1-302(1)*** (2013). But see ***Colo. Rev. Stat. § 24-4.1-302.5(1)(f)*** (2012) (limiting conferral right, in particular, to later stages of a criminal proceeding). Despite these limitations on the conferral right, victims retain the ability to be heard at any hearing involving a plea. See id. § 24-4.1-302.5.

[236] *Mo. Ann. Stat. § 595.209(10)* (West 2011).

[237] Office of Victim-Witness Advocacy, N.J. Dep't of Law & Pub. Safety, A Crime Victim's Guide to the Criminal Justice System 4 (2d ed. 1997); see also N.J. Const. art. I, § 22. Compare *18 U.S.C. § 3771* (2012), with *N.J. Stat. Ann. § 52:4B-36* (West 2009). In addition to the rights similar to the federal legislation, New Jersey law provides for the right "to be advised of case progress and final disposition and to confer with the prosecutor's representative so that the victim may be kept adequately informed … ." Id. § 52:4B-36(k).

[*101] crimes or crimes against children." [241] In Indiana, the plain language of its statute leaves open the possibility of a conferral right before formal charges to the extent that the statute includes two separate time frames: "after a crime … has been charged" or "before any disposition of a criminal case involving the victim." [242]

To be sure, not all states have afforded victims a voice throughout the entirety of the criminal justice process. [243] In some states, the statutes are ambiguous. [244] In a handful of states, there is clear language limiting rights until after the filing of charges. For example, Louisiana constrains the conferral right to criminal matters "in which formal charges have been filed by the district attorney's office." [245] Yet, unlike the federal ***CVRA***, this statute specifically excludes pre-charging situations. And, in any event, despite Louisiana's limitation on a particular right within the statute, the legislature in this state still often saw fit to provide the victim with notification rights, even in the absence of the formal filing of charges. [246]

Very few state courts have ever considered the precise issue of whether conferral rights may attach prior to the formal filing of charges. This is likely caused by the fact that, unlike the federal statute, many state statutes fail to provide the victim with a procedural mechanism for challenging the conduct of prosecutors or law enforcement agencies. [247] However, in rare cases, state courts have implicitly recognized that a meaningful interpretation of victims' rights should include some rights prior to filing.

For example, a Connecticut court concluded that a company injured by the delinquent act of a minor was entitled to information about the case **[*102]** contained in a police file in a civil proceeding, even though it appears that there was little indication that criminal charges had been filed. [248] Similarly, the South Carolina Supreme Court, while limiting the ability of the victim to challenge the conduct of a prosecutor, concluded that the same rights under the state constitution must attach prior to the formal filing of an indictment. [249] Other courts have even permitted a victim to recover compensation or reparations for unindicted or acquitted conduct. [250]

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[238] See *Office of Victim-Witness Advocacy, supra* note 237, at 4 (including pre-grand jury remand, administrative dismissal, grand jury remand, grand jury dismissal, and indictment returned).

[239] Id. at 26 (describing victim involvement at grand jury and arraignment stages of the proceeding).

[240] See *Mass. Ann. Laws ch. 258B, § 2* (LexisNexis 2004).

[241] *Idaho Code Ann. § 19-5306(1)(f)* (2004). As in the case of most of the state statutes, the Idaho statute is not without ambiguity. A different provision within the statute makes the notification right contingent "upon the filing of a criminal complaint or juvenile petition … ." Id. § 19-5306(2).

[242] *Ind. Code Ann. § 35-40-5-3(b)* (West 2012); id. § 35-40-1-1 (failing to define "case").

[243] See, e.g., Md. Const. art. 47(b) ("In a case originating by indictment or information filed in a circuit court, a victim of crime shall have the right to be informed … .").

[244] In Delaware, for example, the statute contains an additional limitation in the conferral provision that is noticeably absent from the duty imposed on law enforcement to provide information about the victim's rights to that victim. Compare *Del. Code Ann. tit. 11, § 9405* (2007), and *Del. Code Ann. tit. 11, § 9411* (2007) (imposing additional requirements after the Attorney General commences the prosecution), with *Del. Code Ann. tit. 11, § 9410* (2007). Query whether the limitations imposed in one section should be inferred in the other under the doctrine of expressio unius est exclusio alterius.

[245] La. Rev. Stat. Ann. § 1844(D)(1) (2010).

[246] See id. § 1844.

[247] See generally Douglas E. Beloof, The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review, *2005 BYU L. Rev. 255, 300-23* (discussing problems with remedies in victims' rights statutes).

[248] See *In re James B., Jr., 714 A.2d 735 (Conn. Super. Ct. 1998).*

In other words, while few state judiciaries have addressed the precise timing of state crime victims' rights, those that have addressed the question have typically found that the rights do extend to pre-charging situations.

Despite the relative dearth of state court cases, it is worth noting that most state statutes unequivocally provide for notification rights early in the criminal process. [251] For example, the Illinois statute imposes a limited duty on law enforcement agencies to keep victims informed of the status of an investigation until the accused is apprehended or the agency discontinues the investigation. [252] Similarly, law enforcement agencies in Iowa must keep the victim apprised of the investigation "until the alleged assailant is apprehended or the investigation is closed." [253] Michigan's statute requires law enforcement to provide information within a mere twenty-four hours of contact between the agency and the victim. [254]

In sum, while state law on crime victims' rights before charging is not fully developed, what law exists tends to support the position that crime victims deserve rights before the formal filing of charges. This law fits the long-standing trend in states toward expanding protections for crime **[*103]** victims. [255] The decision by state legislators to extend notification or conferral rights to crime victims demonstrates an express recognition that crime victims' meaningful participation in the criminal justice process may involve granting those victims rights before indictment.

Conclusion

Crime victims have important rights at stake in the criminal justice process, even before prosecutors formally file criminal charges. It is hardly surprising, therefore, to find that a federal law that Congress in fact designed to create "broad and encompassing" rights for victims protects victims during a criminal investigation. As this Article has explained, interpreting the ***CVRA*** to cover crime victims during the pre-charging phase of a case is consistent with the statute's purposes, text, legislative history, and interpretive case law. And state criminal justice systems also appear to be moving in that direction.

The Justice Department's contrary interpretation seems unlikely to prevail when challenged. The ***CVRA*** signals a paradigm shift in the way that crime victims are to be treated, at least within the federal criminal justice system. Before enactment of the law, federal investigators and prosecutors might have been able to keep victims at arm's length, refusing to confer with them about the case and otherwise ignoring or even mistreating them during the process. But those days are over. The ***CVRA*** promises victims that they now have the right to confer with prosecutors and the right to be treated fairly while their cases are investigated. It is time for the Department of Justice to recognize and embrace that new reality.

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[249] See *Ex parte Littlefield, 540 S.E.2d 81, 85 (S.C. 2000).*

[250] See Kimberly J. Winbush, Annotation, Persons or Entities Entitled to Restitution as "Victim" Under State Criminal Restitution Statute, 92 A.L.R. 5th 35, 35 (2001) (recounting cases in which unnamed victims were entitled to restitution).

[251] See, e.g., *Minn. Stat. Ann. § 611A.0315(a)* (West 2009) (requiring a prosecutor to "make every reasonable effort to notify a victim of domestic assault … or harassment that the prosecutor has decided to decline prosecution of the case" but providing the right to participate in proceedings to circumstances in which the offender has been charged).

[252] See *725 Ill. Comp. Stat. Ann. 120/4.5* (2008).

[253] *Iowa Code Ann. § 915.13(1)(f)* (West 2003).

[254] See *Mich. Comp. Laws Ann. § 780.753* (West 2007). Michigan's conferral right is particularly ambiguous, because the notification requirement imposed upon the prosecuting attorney contains a time limitation (after arraignment), but the legislature did not include an express time limitation on the conferral right. See *Mich. Comp. Laws Ann. § 780.756(3)* (West 2007) (requiring the victim have the opportunity to consult prior to "any negotiation that may result in a dismissal, plea or sentence bargain, or pretrial diversion"); see also *Miss. Code Ann. § 99-43-7(1)* (2007) (imposing a requirement on law enforcement officials to notify a victim within seventy-two hours).

[255] See Jeffrey A. Parness et al., Monetary Recoveries for State Crime Victims, *58 Clev. St. L. Rev. 819, 850 (2010);* Tobolowsky, supra note 221, at 59 (describing a "significant expansion of victim rights to be consulted by the prosecutor and heard by the court").

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ARTICLE: Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure

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Text

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I. Introduction

Federal courts should treat crime victims fairly in the criminal process. In a nod to that goal, the Advisory Committee on the Federal Rules of Criminal Procedure (Advisory Committee) has circulated for public comment proposed ***amendments*** to the Federal Rules of Criminal Procedure (the Rules) regarding crime victims' rights. These ***amendments*** attempt to implement the recently-enacted Crime Victims' Rights Act (***CVRA***), [1] which guarantees crime victims a series of rights, including the right to be treated fairly. Unfortunately, the proposed ***amendments*** are mere tentative, half measures that do not begin to fully protect crime victims.

This Article contends that the Advisory Committee should broaden its vision of the proper role for crime victims and recommend far more expansive victim protections. In the ***CVRA***, Congress articulated specific rights for crime victims, such as the right to be notified of court hearings, to attend those hearings, and to speak at appropriate points in the process. [2] But along with these specific rights came the sweeping requirement that crime victims "be treated with fairness and with respect for the victim's dignity and privacy." [3] This congressional command must not be ignored. In addition, entirely apart from any congressional dictate, crime victims deserve fair treatment in the federal system. Acting for the federal judiciary, the Advisory Committee should make certain that the Rules fully reflect victims' interests rather than allow the initiative for protecting victims to pass to other branches of government.

This Article proceeds in five parts. Following this Introduction, Part II reviews events leading to the recently circulated ***amendments***. The ***amendments*** were prompted by the ***CVRA*** - an act passed by Congress in 2004 to protect victims' rights through the federal criminal process. To comply with the ***CVRA***, the federal criminal rules had to be amended in many places,

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[1] Pub. L. No. 108-405, § 102(a), ***118 Stat. 2260, 2261-62*** (codified as amended at *18 U.S.C. § 3771* (Supp. 2006)).

[2] *18 U.S.C. § 3771* (a)(2)-(4).

[3] Id. § 3771(a)(8).

as I argued at length in an earlier article. [4] After receiving my suggested changes, the Advisory Committee agreed with some, but declined to adopt many of the others. At issue for the Advisory Committee was whether to proceed narrowly by changing only a few rules to track specific congressional directives or to proceed more broadly by reworking the entire body of federal criminal rules to ensure that they are all fair to crime victims. The Committee opted for the narrower approach.

Part III of this Article disputes the Advisory Committee's limited vision. Congress has required that the courts must treat crime victims "with fairness" throughout the process. [5] The only way to fully implement that command is a **[*864]** thorough reworking of the federal criminal rules to integrate victims into the day-to-day workings of the process. The Committee's parsimonious ***amendments*** simply ignore that congressional directive and mean that, in practice, many of the federal criminal rules will continue to overlook the legitimate interests of crime victims.

Part IV of this Article contains a rule-by-rule analysis of changes that should be made to the federal rules. The following changes are of particular importance:

1. Ensuring that crime victims' attorneys can appear in court (Rule 1);

2. Providing for victim participation in the plea bargain process (Rule 11);

3. Protecting victims' addresses and telephone numbers from improper disclosure (Rule 12);

4. Guaranteeing victims the right to attend criminal depositions (Rule 15);

5. Protecting victims from having personal and confidential information improperly subpoenaed (Rule 17);

6. Considering victims' interests when cases are transferred or when a bench trial is ordered (Rules 21 and 23);

7. Integrating victims into the sentencing process (Rule 32);

8. Articulating victims' right to discretionary appointment of counsel (Rule 44.1);

9. Giving victims the right to be heard at bail decisions (Rule 46);

10. Requiring victims' views be considered before a case is dismissed (Rule 48);

11. Protecting victims' right to a speedy trial (Rule 50);

12. Giving victims notice of court proceedings and of their rights in those proceedings (Rule 60(a)(1));

13. Guaranteeing victims the right to attend court proceedings (Rule 60(a)(2));

14. Guaranteeing victims the right to be heard on bail, plea, sentencing, and other issues important to victims (Rule 60(a)(3)).

Finally, Part V briefly concludes by explaining that the likely consequence of the Advisory Committee failing to fully implement Congress's vision will be that Congress itself will step in to do the job. It would be unfortunate if the Judiciary were to abdicate its responsibilities to protect crime victims and leave the task to another branch of government.

This Article also contains a short Afterword, which recounts developments subsequent to the drafting of this Article in January 2007.

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II. Victims' Rights, the ***CVRA***, and ***Amendments*** to the Rules

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[4] See Paul G. Cassell, Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed ***Amendments*** in Light of the Crime Victims' Rights Act, *2005 BYU L. Rev. 835, 852-924* [hereinafter Cassell, Proposed ***Amendments***].

[5] *18 U.S.C. § 3771*(a)(8).

A. The Crime Victims' Rights Movement

The Crime Victims' Rights Movement developed in the 1970s because of a perceived imbalance in the criminal justice system. The victims' absence from criminal processes conflicted with "a public sense of justice keen enough that … it has found voice in a nationwide "victims' rights' movement." [6] Victims advocates argued that the criminal justice system had become preoccupied with defendants' rights to the exclusion of considering the legitimate interests of crime victims. [7] These advocates urged reforms to give more attention to victims' concerns, including protecting victims' rights to be notified of court hearings, to attend those hearings, and to be heard at appropriate points in the process.

The victims movement received considerable impetus in 1982 with the publication of the report of the President's Task Force on Victims of Crime ("Task Force"). The Task Force concluded that "the criminal justice system has lost an essential balance… . The system has deprived the innocent, the honest, and the helpless of its protection… . The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be reddressed." [8] The Task Force advocated multiple reforms. It recommended that prosecutors assume the responsibility for keeping victims notified of all court proceedings and bringing to the court's attention the victim's view on such subjects as bail, plea bargains, sentences, and restitution. [9] It also urged that courts receive victim-impact evidence at sentencing, order restitution in most cases, and allow victims and their families to attend trials even if they would **[*866]** be called as witnesses. [10] In its most sweeping recommendation, the Task Force proposed a federal constitutional ***amendment*** to protect crime victims' rights "to be present and to be heard at all critical stages of judicial proceedings." [11]

In the wake of the recommendation for a constitutional ***amendment***, crime victims' advocates considered how best to pursue that goal. Realizing the difficulty of achieving the consensus required to amend the United States Constitution, advocates decided to go first to the states to enact state victims' rights ***amendments***. They have had considerable success with this "states-first" strategy. [12] To date, about thirty states have adopted ***amendments*** to their own state constitutions, [13] which protect a wide range of victims' rights.

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[6] *Payne v. Tennessee, 501 U.S. 808, 834 (1991)* (Scalia, J., concurring) (internal quotations omitted). See generally Douglas E. Beloof, Paul G. Cassell & Steven J. Twist, Victims in Criminal Procedure 638-39 (2d ed. 2005) (discussing the need for victims' participation in the criminal justice system); see also Shirley S. Abrahamson, Redefining Roles: The Victims' Rights Movement, 1985 Utah L. Rev. 517; Douglas Evan Beloof, The Third Model of Criminal Process: The Victim Participation Model, *1999 Utah L. Rev. 289;* Paul G. Cassell, Barbarians at the Gates? A Reply to the Critics of the Victims' Rights ***Amendment***, *1999 Utah L. Rev. 479* [hereinafter Cassell, Barbarians at the Gates]; Paul G. Cassell, Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights ***Amendment***, *1994 Utah L. Rev. 1373* [hereinafter Cassell, Balancing the Scales]; Abraham S. Goldstein, Defining the Role of the Victim in Criminal Prosecution, 52 Miss. L.J. 514 (1982); William T. Pizzi & Walter Perron, Crime Victims in German Courtrooms: A Comparative Perspective on American Problems, *32 Stan. J. Int'l L. 37 (1996);* Steven J. Twist, The Crime Victims' Rights ***Amendment*** and Two Good and Perfect Things, *1999 Utah L. Rev. 369.*

[7] See generally Beloof, Cassell & Twist, supra note 6, at 29-38; Douglas Evan Beloof, The Third Wave of Victims' Rights: Standing, Remedy and Review, *2005 BYU L. Rev. 255;* Cassell, Balancing the Scales, supra note 6, at 1380-82 (arguing for increased rights of crime victims in criminal justice systems).

[8] President's Task Force on Victims of Crime, Final Report 114 (1982).

[9] Id. at 63.

[10] Id. at 72-73.

[11] Id. at 114 (emphasis omitted).

[12] See S. Rep. No. 108-191, at 3 (2003).

[13] See Ala. Const. amend. 557; Alaska Const. art. I, § 24; Ariz. Const. art. II, § 2.1; Cal. Const. art. I, §§12, 28; Colo. Const. art. II, § 16a ; Conn. Const. art. I, § 8(b); Fla. Const. art. I, § 16(b); Idaho Const. art. I, § 22; Ill. Const. art. I, § 8.1; Ind. Const. art. I, § 13(b); Kan. Const. art. 15, § 15; La. Const. art. 1, § 25; Md. Decl. of Rights art. 47; Mich. Const. art. I, § 24; Miss. Const. art. 3, § 26A; Mo. Const. art. I, § 32; Neb. Const. art. I, § 28; Nev. Const. art. I, § 8; N.J. Const. art. I, § 22; N.M. Const. art. 2, § 24; N.C. Const. art. I, § 37; Ohio Const. art. I, § 10a; Okla. Const. art. II, § 34; Or. Const. art. 1, § 42; R.I. Const. art. I, § 23; S.C. Const. art. I, § 24; Tenn. Const. art. 1, § 35; Tex. Const. art. I, § 30; Utah Const. art. I, § 28; Va. Const. art. I, § 8-A; Wash. Const. art. 2, § 33; Wis. Const. art. I, § 9m.

The Crime Victims' Rights Movement was also able to prod the federal system to recognize victims' rights. In 1982, Congress passed the first federal victims' rights legislation, the Victim and Witness Protection Act, which gave victims the right to make an impact statement at sentencing and provided expanded restitution. [14] Since then, Congress has passed several acts that further protected victims' rights, including the Victims of Crime Act of 1984, [15] the Victims' Rights and Restitution Act of 1990, [16] the Violent Crime Control and Law Enforcement Act of 1994, [17] the Antiterrorism and Effective Death Penalty Act of 1996, [18] and the Victim Rights Clarification Act of 1997. [19] Other federal statutes have been passed to deal with specialized victim situations, such as child victims and witnesses. [20]

Among these, the Victims' Rights and Restitution Act of 1990 is worth briefly highlighting. This act purported to create a comprehensive list of victim's rights in the federal criminal justice process. The act commanded that "[a] crime victim has the following rights" [21] and then listed various rights in the process. Among the **[*867]** rights were the right to "be treated with fairness and with respect for the victims' dignity and privacy," [22] to "be notified of court proceedings," [23] to "confer with [the] attorney for the Government in the case," [24] and to attend court proceedings, even if called as a witness, unless the victim's testimony "would be materially affected" by hearing other testimony at trial. [25] The statute also directed the Justice Department to make its "best efforts" to ensure that victims received their rights. [26] Yet this act never successfully integrated victims into the federal criminal justice process and was generally regarded as something of a dead letter. Because Congress passed the ***CVRA*** in 2004 to remedy the problems with this law, it is worth briefly reviewing why it was largely unsuccessful.

Curiously, the Victims' Rights Act was codified in Title 42 of the United States Code - the title dealing with "Public Health and Welfare." As a result, the statute was generally unknown to federal judges and criminal law practitioners. Federal practitioners reflexively consult Title 18 for guidance on criminal law issues. More prosaically, federal criminal enactments are bound together in a single West publication - the Federal Criminal Code and Rules. This single publication is carried to court by prosecutors and defense attorneys and is on the desk of most federal judges. Because West Publishing never included the Victims' Rights Act in this book, the statute was essentially unknown even to the most experienced judges and attorneys. The prime illustration of the ineffectiveness of the Victims' Rights Act comes from the Oklahoma City bombing case, where victims were denied rights protected by statute in large part because the rights were not listed in the criminal rules. [27]

Because of such problems with the statutory protection of victims' rights, victims advocates decided in 1995 the time was right to press for a federal constitutional ***amendment***. They argued that the statutory protections could not sufficiently guarantee

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[14] Pub. L. No. 97-291, *96 Stat. 1248 (1982).*

[15] Pub. L. No. 98-473, *98 Stat. 2170 (1984).*

[16] Pub. L. No. 101-647, ***104 Stat. 4820 (1990).***

[17] Pub. L. No. 103-322, ***108 Stat. 1796 (1994).***

[18] Pub. L. No. 104-132, ***110 Stat. 1214 (1996).***

[19] Pub. L. No. 105-6, ***111 Stat. 12 (1997).***

[20] See, e.g., *18 U.S.C. § 3509* (2006) (protecting rights of child victim-witnesses).

[21] Pub. L. No. 101-647, § 502(b) (1996).

[22] Id. § 502(b)(1).

[23] Id. § 502(b)(3).

[24] Id. § 502(b)(5).

[25] Id. § 502(b)(4).

[26] Id. § 502(a).

[27] *United States v. McVeigh, 157 F.3d 809, 814-815 (10th Cir. 1998).* See generally Cassell, Barbarians at the Gates, supra note 6, at 515-22 (discussing this case in greater detail).

victims' rights. In their view, such statutes "frequently fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, [or] sheer inertia." [28] As the Justice Department reported:

Efforts to secure victims' rights through means other than a constitutional ***amendment*** have proved less than fully adequate. Victims' rights advocates have sought reforms at the state level for the past twenty years, and many states have responded with state statutes and **[*868]** constitutional provisions that seek to guarantee victims' rights. However, these efforts have failed to fully safeguard victims' rights. These significant state efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights. [29]

To place victims' rights in the constitution, victims advocates (led most prominently by the National Victims Constitutional ***Amendment*** Network [30]) approached the President and Congress about a federal ***amendment***. [31] In April 22, 1996, Senators Kyl and Feinstein introduced a federal victims' rights ***amendment*** with the backing of President Clinton. [32] The intent of the ***amendment*** was to "restore, preserve, and protect, as a matter of right for the victims of violent crimes, the practice of victim participation in the administration of criminal justice that was the birthright of every American at the founding of our Nation." [33] A companion resolution was introduced in the House of Representatives. [34] The proposed ***amendment*** embodied seven core principles: (1) the right to notice of proceedings, (2) the right to be present, (3) the right to be heard, (4) the right to notice of the defendant's release or escape, (5) the right to restitution, (6) the right to a speedy trial, and (7) the right to reasonable protection. In a later resolution, an eighth principle was added: standing. [35]

The ***amendment*** failed to pass in the 104th Congress. On January 21, 1997, the opening day of the first session of the 105th Congress, Senators Kyl and Feinstein reintroduced the ***amendment***. [36] A series of hearings were held that year in both the House and the Senate. [37] Responding to some of the concerns raised in these hearings, the ***amendment*** was reintroduced the following year. [38] The Senate Judiciary Committee held hearings [39] and passed the proposed ***amendment***. [40] However, the full Senate did not consider the ***amendment***. In 1999, Senators Kyl **[*869]** and Feinstein again proposed the ***amendment***. [41] On September 30, 1999, the Judiciary Committee again voted to send the ***amendment*** to the full Senate. [42] But on April 27,

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[28] Laurence H. Tribe & Paul G. Cassell, Embed the Rights of Victims in the Constitution, L.A. Times, July 6, 1998, at B5.

[29] Victims' Rights ***Amendment***: Hearing on S.J. Res. 6 Before the S. Judiciary Comm., 105th Cong. 64 (1997) (statement of Janet Reno, U.S. Att'y Gen.).

[30] See *www.nvcap.org* (last visted Dec. 30, 2007).

[31] For a comprehensive history of victims' efforts to pass a constitutional ***amendment***, see Jon Kyl, Steven J. Twist & Stephen Higgins, On the Wings of Their Angels, the Scott Campbell, Stephanie Roper, Wendy Preseon, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, *9 Lewis & Clark L. Rev. 581, 583-91 (2005).*

[32] S.J. Res. 52, 104th Cong. (1996).

[33] S. Rep. No. 108-191, at 1-2 (2003); see also S. Rep. No. 106-254 (2000) (listing recommendations for the federal victims' rights ***amendment***).

[34] H.R.J. Res. 174, 104th Cong. (1996).

[35] S.J. Res. 65, 104th Cong. (1996).

[36] S.J. Res. 6, 105th Cong. (1997).

[37] See, e.g., Victims' Rights ***Amendment***: Hearing on S.J. Res. 6 Before the S. Judiciary Comm., 105th Cong. (1997).

[38] S.J. Res. 44, 105th Cong. (1998).

[39] Crime Victim's Rights Constitutional ***Amendment***: Hearings on S.J. Res. 44 Before the S. Judiciary Comm., 105th Cong. (1998).

[40] See 144 Cong. Rec. S11,010 (daily ed. Sept. 28, 1998).

[41] S.J. Res. 3, 106th Cong. (1999).

2000, after three days of floor debate, the ***amendment*** was shelved when it became clear that its opponents had the votes to sustain a filibuster. [43] At the same time, hearings were held in the House on the companion measure there. [44]

Discussions about the ***amendment*** began again after the 2000 presidential elections. On April 15, 2002, Senators Kyl and Feinstein again introduced the ***amendment***. [45] The following day, President Bush announced his support. [46] On May 1, 2002, a companion measure was proposed in the House. [47] On January 7, 2003, Senators Kyl and Feinstein proposed the ***amendment*** as Senate Joint Resolution 1. The Senate Judiciary Committee held hearings in April of that year, [48] followed by a written report supporting the ***amendment***. [49] On April 20, 2004, a motion to proceed to consider the ***amendment*** was filed in the Senate. Shortly thereafter, the motion to proceed was withdrawn when proponents determined they did not have the sixty-seven votes necessary to pass the measure. After it had become clear that the necessary super-majority votes were not available to amend the Constitution, victims advocates turned their attention to enactment of a comprehensive victims' rights statute.

B. The Crime Victims' Rights Act

The Crime Victims' Rights Act ultimately resulted from a decision by the victims' movement to seek a more comprehensive and enforceable federal statute rather than to pursue the dream of a federal constitutional ***amendment***. In April 2004, victims advocates met with Senators Kyl and Feinstein to decide whether to push again for a federal constitutional ***amendment***. Concluding that the ***amendment*** lacked the required supermajority, the advocates decided to press for a far-reaching federal statute protecting victims' rights in the federal criminal justice system. [50] In exchange for backing off from the constitutional ***amendment*** in the short term, victims advocates received near universal congressional support for a "broad and encompassing" statutory victims' bill of rights. [51] This "new and bolder" approach not only created a bill of rights for victims, but also provided funding for victims' **[*870]** legal services and created remedies when victims' rights were violated. [52] The victims' movement would then see how this statute worked in future years before deciding whether to continue to push for a federal ***amendment***. [53]

The legislation that ultimately passed - the Crime Victims' Rights Act - gives victims "the right to participate in the system." [54] It lists various rights for crime victims in the process of prosecuting the accused, including the right to be notified of court hearings, the right to attend those hearings, the right to be heard at appropriate points in the process, and the right to be treated with fairness. [55] Rather than relying merely on the "best efforts" of prosecutors to vindicate the rights, the ***CVRA*** also contains

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[42] 146 Cong. Rec. S2986 (daily ed. Apr. 27, 2000) (statement of Sen. Kyl).

[43] Id. at S2966 (statement of Sen. Kyl).

[44] H.R.J. Res. 64, 106th Cong. (2000).

[45] S.J. Res. 35, 107th Cong. (2002).

[46] 149 Cong. Rec. 582 (daily ed. Jan. 7. 2003) (statement of Sen. Kyl).

[47] H.R.J. Res. 91, 107th Cong., (2002).

[48] A Proposed Constitutional ***Amendment*** to Protect Crime Victims, S.J. Res. 1: Hearings Before the S. Comm. on the Judiciary, 108th Cong. (2003).

[49] S. Rep. No. 108-191 (2003).

[50] Kyl et al., supra note 31, at 591-92.

[51] 150 Cong. Rec. S4261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[52] Id. at S4263 (statement of Sen. Feinstein).

[53] Id. at S4260 (statement of Sen. Kyl); see also Prepared Remarks of Attorney General Alberto R. Gonzales, Hoover Inst. Bd. of Overseers Conference (Feb. 28, 2005) (indicating a federal victims' rights ***amendment*** remains a priority for President Bush).

[54] 150 Cong. Rec. S4263 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein). For a description of victim participation, see Beloof, supra note 6.

[55] *18 U.S.C. § 3771*(a) (2006).

specific enforcement mechanisms. [56] Most important, the ***CVRA*** directly confers standing onto victims to assert their rights, a flaw in the earlier enactment. [57] The act provides that rights can be "asserted" by "the crime victim or the crime victim's lawful representative, and the attorney for the Government." [58] The victim (or the government) may appeal any denial of a victim's right through a writ of mandamus on an expedited basis. [59] The courts are also required to "ensure that the crime victim is afforded" the rights given by the new law. [60] These changes were intended to make victims "an independent participant in the proceedings." [61]

C. My Proposed ***Amendments*** to the Federal Rules of Criminal Procedure

In the wake of the ***CVRA***, the Federal Rules of Criminal Procedure needed to be significantly amended to comply with the statute's mandates. With this goal in mind, I prepared a comprehensive set of proposed ***amendments*** to the Rules and submitted them to the Advisory Committee on the Federal Rules of Criminal Procedure. [62]

My proposals began from the premise that "victims now must be folded into the process through which federal courts conduct criminal cases, including bail, plea, trial, and sentencing hearings." [63] Because the federal rules are the "playbook" **[*871]** of the federal courts, it seemed advisable to reflect the new role of victims throughout the Rules. Moreover, Congress intended the ***CVRA*** to be "a formula for success" and a "model for our States." [64] The only way the federal rules could serve as a model, I argued, was by fully implementing victims' rights. I then proposed twenty-eight specific changes to the Federal Rules of Criminal Procedure to integrate crime victims into the federal process. [65] Each of these proposals included both specific text for an ***amendment*** and a legal justification for the change.

D. The Criminal Rules Committee Proposals

The Advisory Committee took up my proposed rule changes in the summer of 2005. The distinguished chair of the committee, Judge Susan Bucklew, appointed a subcommittee, chaired by Judge James Jones, to consider changes to the federal rules to implement the ***CVRA***. The Subcommittee, including its reporter, Professor Sara Sun Beale, prepared a report to the full committee recommending only a few changes to the Rules. [66] The Subcommittee "felt that it would not be appropriate to create new victim rights not based upon the statute." [67] Accordingly, the Subcommittee recommended just a few changes to the Rules, essentially parroting a few parts of the ***CVRA***'s language.

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[56] Id.

[57] Cf. Beloof, supra note 7, at 283 (identifying this as a pervasive flaw in victims' rights enactments).

[58] *18 U.S.C. § 3771*(d)(1).

[59] Id. § 3771(d)(3).

[60] Id. § 3771(b)(1).

[61] 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[62] See Cassell, Proposed ***Amendments***, supra note 4.

[63] Id. at 852.

[64] Id. at 854-55 (quoting 150 Cong. Rec. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein)).

[65] Id. at 856-923.

[66] Memorandum from Professor Sara Sun Beale, Reporter, to the Members of the Crim. Rules Advisory Comm. (Sept. 19, 2005) [hereinafter ***CVRA*** Subcommittee Memo]. This document does not appear on the helpful website regarding federal rulemaking - *www.uscourts.gov/rules*. To make the document more widely available, I have posted the report on my website -*http://www.law.utah.edu/paul-cassell*.

[67] ***CVRA*** Subcommittee Memo, supra note 66, at 2.

The full Advisory Committee took up the Subcommittee's proposals at its meeting on October 24-25, 2005. [68] It largely agreed with the Subcommittee's proposals, approving a limited set of changes to the Rules to implement the ***CVRA***. The Advisory Committee sent a report of its proposed changes to the Standing Committee on Rules of Practice and Procedure in December, 2005. [69] The Advisory Committee described its changes as seeking "to incorporate, but not go beyond, the rights created by the statute." [70] The rules were then circulated for nationwide public comment. [71] The Advisory Committee held a public hearing on **[*872]** the rule change in Washington, D.C. on January 26, 2007. I testified at the hearing, presenting this Article as my testimony. [72]

III. The ***CVRA***'s Right to Fairness Requires Comprehensive Changes to Protect Victims

The ***CVRA*** requires fundamental changes in the Federal Rules of Criminal Procedure. The ***CVRA*** makes crime victims participants in the criminal justice process and commands in sweeping terms that the courts must treat victims "with fairness and with respect for the victim's dignity and privacy." [73] To faithfully implement that directive, it is necessary to assess each of the existing rules against a fairness standard and then make changes and additions where the Rules do not guarantee fair treatment to victims.

The Advisory Committee has made some useful progress in that direction. It should be commended for the careful drafting of its proposed changes and the thoroughness with which it explored the topic. Moreover, it is the nature of articles such as this one to highlight points of disagreement rather than points of agreement. The Advisory Committee has seen fit to adopt several of the proposals that I recommended, [74] a fact that should not be overlooked.

Unfortunately, the Advisory Committee acted timidly. Instead of reviewing all the Rules to determine whether they treated victims fairly, the Advisory Committee decided it would not venture beyond parroting specifically described rights in the ***CVRA***. The committee's reporter, well-regarded Duke law professor Sara Sun Beale, articulated the Advisory Committee's drafting technique as simply incorporating rights created by Congress:

The most basic decision was how far beyond the statutory provisions the rules should go at this time. Although the ***CVRA*** enumerates a number of specific rights, it also contains general language stating that victims have a "right to be treated with fairness." Judge Cassell advocates using this general right to fairness as a springboard for a variety of victim rights not otherwise provided for in the ***CVRA***.

[We] concluded that the rules should incorporate, but not go beyond, the specific statutory provisions. The ***CVRA*** reflects a careful Congressional balance between the rights of the defendant, the discretion afforded to prosecution, and the new rights afforded to victims. In light of this careful statutory balance, [we] felt that it would not be appropriate to create new victim rights not based upon the statute. Rather, [we] **[*873]** sought to incorporate the rights Congress did afford into the rules. In so doing, [we] attempted, to the degree possible, to use the statutory language. [We] anticipate[] that the courts will develop the

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[68] Judicial Conference of the United States, Minutes of the Advisory Committee on the Rules of Criminal Procedure (Oct. 24-25, 2005), available at *http://www.uscourts.gov/rules/Minutes/CR10-2005-min.pdf* [hereinafter Advisory Committee Minutes].

[69] Judicial Conference of the United States, Report of the Advisory Committee on Criminal Rules (Dec. 8, 2005), available at *http://www.uscourts.gov/rules/Reports/CR12-2005.pdf* [hereinafter Advisory Committee Report].

[70] Id. at 2.

[71] Committee on Rules of Practice & Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed ***Amendments*** to the Federal Rules of Appellate, Bankruptcy, Civil and Criminal Procedure (Aug. 2006), *www.uscourts.gov/* rules/newrules1.html [hereinafter Proposed ***Amendments***] (last visted Dec. 30, 2007).

[72] All testimony and other comments about the proposed changes can be found at *www.uscourts.gov/rules/Proposed0206-1.htm*.

[73] *18 U.S.C. § 3771*(a)(8) (2006) (emphasis added).

[74] See, e.g., infra notes 96-97 and accompanying text (discussing ***amendment*** to Rule 18).

meaning of the statutory terms on a case-by-case basis, and [we] did not attempt to use the rules to anticipate and resolve the interpretative questions that will arise. [75]

Before debating the merits of the Advisory Committee's position, it is useful to step back and look at the forest rather than the trees. Regardless of how the ***CVRA***'s language on fairness is interpreted, should we really debate treating crime victims fairly? Presumably the general public expects the nation's criminal rules to be fair to all concerned - the government, defendants, and victims. Reflecting that view, for the last twenty years Congress has passed a series of laws extending rights to crime victims. [76] Even without a single word in the ***CVRA*** mentioning fairness, the Advisory Committee should carefully review the existing rules to ensure fairness for victims.

In any event, Congress has spoken. The Advisory Committee's general approach does not faithfully implement the congressional command of fair treatment, as the following sections demonstrate.

A. The ***CVRA***'s Text and Legislative History Create a Substantive Right to Fairness

Turning to the Advisory Committee's specific justifications for not implementing the right to fairness, perhaps its most striking claim is that the right is merely some sort of a "springboard" for other specific rights. The Advisory Committee declines to implement this right because this would "go beyond … the specific statutory provisions" in the ***CVRA***. [77] But the right to fairness is itself one of the specific provisions in the ***CVRA***. The ***CVRA*** grants victims the following rights:

1. The right to be reasonably protected from the accused

2. The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused

3. The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding

[*874] 4. The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding

5. The reasonable right to confer with the attorney for the Government in the case

6. The right to full and timely restitution as provided in law

7. The right to proceedings free from unreasonable delay

8. The right to be treated with fairness and with respect for the victim's dignity and privacy [78]

As in the various state victims' bills of rights, [79] the fairness right is not mere hortatory language. The ***CVRA*** introduced these rights in the statute with the introductory clause: "A crime victim has the following rights … ." [80] Thus, the right to fairness is

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[75] ***CVRA*** Subcommittee Memo, supra note 66, at 1-2. The Advisory Committee largely adopted the recommendation of the subcommittee. To simplify this Article, I will generally ascribe the views of the subcommittee to the Advisory Committee.

[76] See supra notes 14-20 and accompanying text.

[77] ***CVRA*** Subcommittee Memo, supra note 66, at 1.

[78] *18 U.S.C. § 3771*(a) (2006) (emphasis added).

[79] See, e.g., Alaska Const. art. I, § 24 (victim's right "to be treated with dignity, respect, and fairness during all phases of the criminal and juvenile justice process"); Ariz. Const. art. II, § 2.1(A)(1) (victim's right "to be treated with fairness, respect, and dignity"); Idaho Const. art. I, § 22(1) (victim's right "to be treated with fairness, respect, dignity and privacy throughout the criminal justice process"); Ill. Const. art. I, § 8.1(a)(1) (victim's right "to be treated with fairness and respect for their dignity"); Mich. Const. art. I, § 24(1) (victim's right "to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process"); N.J. Const. art. I, § 22 (victim's right to "be

to be given real world application. To be sure, it is a broad right - akin to the defendant's broad right to "due process of law." [81] But to implement that right in the criminal rules is not "creating new victims rights not based upon the statute," as the Advisory Committee puts it, but simply implementing a clearly articulated congressional command.

It is a "cardinal principle of statutory construction" that effect must be given to every word in a statute. [82] Under the Advisory Committee's approach, the congressional directive that crime victims be treated fairly will have no effect on **[*875]** any of the Rules. The fairness directive will, in other words, be rendered mere surplusage - something that the Supreme Court has repeatedly cautioned against. [83]

The Advisory Committee also admits that it is interpreting the ***CVRA*** narrowly, contrary to the standard rule that remedial legislation is to be construed broadly. [84]

In addition, the Advisory Committee's approach flouts the declared intentions of the Act's drafters. There is no need to guess about Congress's intent on the right of fairness. Senator Kyl, who cosponsored the ***CVRA*** with Senator Feinstein, explained quite directly that Congress meant for the right to have substantive content:

The broad rights articulated in this section [section 8, mandating victims be treated with fairness along with dignity and respect] are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, fairness includes the notion of due process. [85]

Nor is there any doubt that Congress intended this command to reach the judiciary, including judicial branch components like the Advisory Committee. Again, Senator Kyl specifically addressed this point:

Too often victims of crime experience a secondary victimization at the hands of the criminal justice system. This provision [section 8] is intended to direct government agencies and employees, whether they are in executive or judicial branches, to treat victims of crime with the respect they deserve and to afford them due process. [86]

The Advisory Committee's decision not to treat fairness as an enforceable right is so at odds with the ***CVRA***'s legislative history that one becomes curious as to why the Advisory Committee determined not to follow it. The Advisory Committee also diverged from the legislative history in several other areas. [87] In reviewing the Advisory Committee's records, however, notably absent is any mention of legislative intent. The Advisory Committee does not cite the statute's **[*876]** legislative

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treated with fairness, compassion and respect by the criminal justice system"); N.M. Const. art. II, § 24(A)(1) (the "right to be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process"); Ohio Const. art. I, § 10a (victims "shall be accorded fairness, dignity, and respect in the criminal justice process"); Tex. Const. art. I, § 30(a)(1) ("right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process"); Utah Const. art. I, § 28(1)(a) (victim's right to be "treated with fairness, respect, and dignity"); Wisc. Const. art. I, § 9m (victim's right to be treated with "fairness, dignity and respect for their privacy"). See generally Cassell, Balancing the Scales, supra note 6, at 1387-88 (discussing victim's right to fairness in Utah).

[80] *18 U.S.C. § 3771*(a) (emphasis added).

[81] ***U.S. Const. amend. V***; see also ***U.S. Const. amend. XIV*** (due process right in state proceedings).

[82] See, e.g., *Duncan v. Walker, 533 U.S. 167, 174 (2001)* (quoting *United States v. Menasche, 348 U.S. 528, 538-39 (1955)).*

[83] See, e.g., *Babbit v. Sweet Home Chapter of Comtys. for a Great Or., 515 U.S. 687, 698 (1995).*

[84] See, e.g., *Hughes v. Box, 814 F.2d 498, 501 (8th Cir. 1987); Gardner & N. Roofing & Siding Corp. v. Bd. of Governors of Fed. Reserve Sys., 464 F.2d 838, 841 (D.C. Cir. 1972).*

[85] 150 Cong. Rec. 4269 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added); see also 150 Cong. Rec. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[86] 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (emphasis added); see also 150 Cong. Rec. 4269 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[87] See, e.g., infra notes 437-443 (noting rejection of Senators Feinstein's and Kyl's views on the right to be heard on issues affecting victims' rights); infra note 488-493 (noting rejection of Senator Kyl's views on the right to be heard on speedy trial issues).

history even once in a twenty-page subcommittee report, in four pages of minutes of its discussions, or in twenty-six pages of proposed ***amendments*** and accompanying Advisory Committee Notes. [88] Perhaps the Advisory Committee took a different approach than the ***CVRA***'s drafters because it did not consider their stated intentions.

If, on the other hand, the Advisory Committee was aware of the drafters' intentions and declined to follow them, it is staking out a rather unusual path. It is standard practice for the Advisory Committee, no less than courts, to look to legislative history in crafting the Rules. [89] With respect to the ***CVRA*** in particular, many courts have found the ***CVRA***'s legislative history highly instructive. They have good reason for relying on the history. Unlike some contentious pieces of legislation where legislators possessed divergent views, the ***CVRA*** enjoyed a "broad, bi-partisan consensus." [90] It passed by a vote of 393 to 14 in the House [91] and by a voice vote in the Senate. [92] Moreover, the ***CVRA***'s cosponsors were bipartisan, and the views they gave on the legislation were not contradicted by anyone else. Thus, as the Ninth Circuit has explained in construing the ***CVRA*** to track Senator Kyl's and Feinstein's views:

Floor statements by the sponsors of the legislation are given considerably more weight than floor statements by other members, and they are given even more weight where, as here, other legislators did not offer any contrary views. Silence, the maxim goes, connotes assent, and so we can draw from the fact that no one registered disagreement with Senators Kyl and Feinstein on this point the reasonable inference that the views they expressed reflected a consensus, at least in the Senate. [93]

In light of all this, it is beyond doubt that crime victims have a substantive right to be treated with fairness (as well as with respect for their dignity and **[*877]** privacy) in the federal criminal justice process. Once that right is in mind, the Advisory Committee has clear duties under the Rules Enabling Act. That Act provides that the Rules "shall not abridge, enlarge or modify any substantive right." [94] Therefore, if any existing rule of criminal procedure "abridges" or even "modifies" a victim's rights to fairness, it is invalid and must be changed. Accordingly, the Advisory Committee must review all the Federal Rules of Criminal Procedure to ensure that they protect victims' right to fairness.

B. The Advisory Committee Treats the Right to Fairness Inconsistently

The Advisory Committee claimed that to implement the right to fairness would use the right as "a springboard for a variety of victim rights not otherwise provided for in the ***CVRA***." [95] If so, the Advisory Committee was unable to consistently follow its own view. The Advisory Committee agreed with my proposed change to Rule 18; that change required that when a court determines where within a judicial district to hold a trial, it should consider not only the convenience of the defendant and the

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[88] See *Advisory Committee Report, supra* note 69, at 1-20; Advisory Committee Minutes, supra note 68, at 13-16; Proposed ***Amendments***, supra note 71, at 349-75.

[89] See, e.g., *Fed. R. Crim. P. 15*, Advisory Committee Note to 1974 ***Amendment*** (quoting directly from the Congressional Record statements from drafter of relevant legislation).

[90] See *United States v. Cienfuegos, 462 F.3d 1160, 1165 (9th Cir. 2006);* see also 150 Cong. Rec. S10910 (daily ed. Oct. 9, 2005) (statement of Sen. Kyl) ("After extensive consultation with my colleagues, broad bipartisan consensus was reached and the language in [the ***CVRA***] was agreed to.").

[91] 150 Cong. Rec. H8208-09 (daily ed. Oct. 6, 2004).

[92] 150 Cong. Rec. S10910 (daily ed. Oct. 9, 2004).

[93] *Kenna v. U.S. Dist. Court for the Cent. Dist. of Cal., 435 F.3d 1011, 1015-16 (9th Cir. 2006)* (internal quotations and citations omitted); accord *United States v. Sharp, 463 F.Supp.2d 556, 561 n.12 (E.D. Va. 2006);* see also *In re Kenna, 453 F.3d 1136, 1137 (9th Cir. 2006)* (looking to legislative history to interpret ***CVRA***); *United States v. Cienfuegos, 462 F.3d 1160, 1165 (9th Cir. 2006)* (same); *United States v. Degenhardt, 405 F. Supp. 2d 1341, 1344 (D. Utah 2006)* (same); *United States v. Ingrassia, 2005 WL 2875220 (E.D.N.Y. 2005)* (same).

[94] *28 U.S.C. § 2072*(b) (2006).

[95] ***CVRA*** Subcommittee Memo, supra note 66, at 1.

witnesses, but also the victim as well. [96] Notably, the Advisory Committee's rationale for this change was to "implement[] the victim's "right to be treated with fairness' under the Crime Victims' Rights Act." [97] But if a change to the relatively obscure Rule 18 is appropriate in light of the victim's right to fairness, why aren't changes to many other, more significant rules also appropriate?

Further highlighting the inconsistent treatment of the right to fairness is the way the Advisory Committee handled parallel provisions in the ***CVRA***. In a single clause, the ***CVRA*** gives victims the right to be treated not only with fairness, but also with dignity and respect: section (a)(8) of the ***CVRA*** provides that victims shall enjoy "the right to be treated with fairness and with respect for the victim's dignity and privacy." [98] The Advisory Committee used victims' rights to dignity and respect as a "springboard" in several places. For example, the Advisory Committee proposed an ***amendment*** to prevent inappropriate subpoenas for personal or confidential information about a victim, explaining that "this ***amendment*** implements the Crime Victims Rights Act, codified at *18 U.S.C. § 3771*(a)(8), which states that victims have a right to respect for their "dignity and privacy.'" [99] Similarly, the Advisory Committee proposed an ***amendment*** to prevent the inappropriate release of a victim's address and telephone number as part of alibi defense disclosures, explaining that "this ***amendment*** implements the victims' rights under the Crime Victims Rights Act … to be treated with respect for the **[*878]** victim's dignity and privacy." [100] Why the Advisory Committee believed it appropriate to try to implement the "dignity and privacy" provisions of the ***CVRA*** but not the immediately adjacent "fairness" provision is unclear.

C. The Advisory Committee Should Not Leave the ***CVRA***'s Interpretation to the Litigation Process.

The Advisory Committee also justified its decision not to review the Rules for fairness on the ground that it would "not attempt to use the rules to anticipate and resolve the interpretative questions that will arise" under the ***CVRA***. [101] Yet a basic purpose - perhaps the basic purpose - behind the procedural rules is to lay out answers to questions that might otherwise have to be litigated. To that end, Rule 2 of the criminal rules provides that "these rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay." [102] It is at odds with securing simplicity in procedure to simply regurgitate the language of the ***CVRA*** in the criminal rules, leaving every interpretative question to the vagaries of litigation.

Historical examples are legion of the Advisory Committee amending the Federal Rules of Criminal Procedure precisely to resolve questions that were being (or might have been) litigated. To provide a few straightforward examples, in 1979 the Advisory Committee amended and clarified the standards for presentence withdrawal of a guilty plea. The Advisory Committee noted that courts had "critically stated that the Rule offers little guidance as to the applicable standard for a presentence withdrawal of plea and that as a result the contours of [the presentence] standard [in the rule] are not easily defined." [103] The ***amendment*** clarified language "which has been a cause of unnecessary confusion." [104]

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[96] See *Advisory Committee Report, supra* note 69, at 8 (adopting proposal from Cassell, Proposed ***Amendments***, supra, note 4, at 878-79).

[97] Id. at 4; accord ***CVRA*** Subcommittee Memo, supra note 66, at 8.

[98] *18 U.S.C. § 3771*(a)(8).

[99] *Advisory Committee Report, supra* note 69, at 3 (note to Proposed Rule 17(c)(3)).

[100] Id. at 351.

[101] ***CVRA*** Subcommittee Memo, supra note 66, at 2.

[102] *Fed. R. Crim. P. 2*.

[103] *Fed. R. Crim. P. 32* advisory committee's note (1979 Amend. to Rule 32(d)) (internal quotation marks omitted).

[104] Id.

In 1983, the Advisory Committee changed Rule 11(a)(2) to eliminate a split of authority on conditional guilty pleas. One of the reasons for the change was to "produce much needed uniformity in the federal system on this matter." [105]

In 1994, the Advisory Committee amended rule 32(b)(2) to give defense counsel an opportunity to be present when probation officers interviewed their clients while preparing a presentence report. [106] The Advisory Committee Notes explained that while there was no constitutional right to counsel at this point in the process, caselaw in two circuits suggested that requests of counsel to be present should be honored as a matter of prudence. [107] What is particularly interesting about **[*879]** this example is that the Advisory Committee stepped in to protect the legitimate interests of defendants even in the absence of a constitutional or statutory command to do so. Of course, the ***CVRA*** creates a statutory command to the Advisory Committee to protect victims' interests.

In 2002, the Advisory Committee amended Rule 51 to provide that court rulings admitting or excluding evidence were governed by the Federal Rules of Evidence. The reason was to avoid "the possibility that an argument might have been made" that an earlier congressional action conflicted with the rules of evidence. [108] In other words, the Advisory Committee simply anticipated and resolved an interpretive question that might otherwise have arisen.

In 2005, the Advisory Committee amended Rule 12.2 to provide sanctions for a party's failure to disclose certain alibi information. [109] The reason for the change was to "fill[] a gap" in the Rules. [110]

In these instances, the Advisory Committee stepped in to avoid unnecessary litigation and to clarify the application of the Rules. Not only is this the Advisory Committee's standard approach, but there are particularly strong reasons for not leaving clarification of crime victims' rules to case-by-case litigation. The most significant problem is that such litigation will occur only in fits and starts. Unlike the government and criminal defendants who always have legal representation, crime victims have no right to appointed counsel and are often indigent or otherwise unable to afford to hire an attorney. [111] As a result, in many cases it is an empty gesture to promise victims that they can litigate application of the Rules. As a practical matter, they will often be unable to do so. [112] Indeed, the Advisory Committee seemingly compounds this problem by declining to put into the Rules any restatement of courts' discretionary authority to appoint counsel for crime victims. [113]

Even in cases where victims can afford counsel to defend their legal rights, the kind of litigation that the Advisory Committee envisions will be unenlightening and formalistic. For instance, while I have proposed including a specific provision in the Rule 11 guilty plea colloquy requiring that the court address a victim before accepting a plea, [114] the Advisory Committee has not recommended any change. This failure could well spawn litigation about the victims' role in the plea process that will require courts to consider why Rule 11 fails to mention crime victims and how this failure interplays with the ***CVRA***'s commands on

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[105] *Fed. R. Crim. P. 11* advisory committee's note (1983 Amend.).

[106] *Fed. R. Crim. P. 32* advisory committee's note (1994 Amend.).

[107] Id.

[108] *Fed. R. Crim. P. 51* advisory committee's note (2002 Amend.).

[109] *Fed. R. Crim. P. 12.2* advisory committee's note (2005 Amend.).

[110] Id.

[111] See Beloof, Cassell & Twist, supra note 6, at 381.

[112] In theory, the government is given authority to assert rights for crime victims, see *18 U.S.C. § 3771*(d)(1) (2006), but in practice the reported cases under the ***CVRA*** thus far show few examples where the government has been willing to do so. See, e.g., *Kenna v. U.S. Dist. Court for the Cent. Dist. of Cal., 435 F.3d 1011, 1018 (9th Cir. 2006)* (victims' assertion of right affirmed; government does not take a position on the claim).

[113] See infra notes 449-463 and accompanying text (discussing proposed rule 44.1).

[114] See infra notes 145-152 and accompanying text.

victims' rights in the **[*880]** plea process. Because the ***CVRA*** guarantees victims a right in the plea process, its dictates will ultimately govern. But only the Advisory Committee can pretermit such needless litigation about how to interpret its rules. In short, it would be much simpler for all concerned if Rule 11 - and, indeed, all the other rules - were redrafted to simply fold victims in at the appropriate point in the process.

Finally, one of the overriding goals of the ***CVRA*** is to dramatically reform the entire approach of the federal criminal justice system. As Senator Feinstein explained "this legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process." [115] And Senator Kyl added, "[a] central reason for these rights is to force a change in a criminal justice culture which has failed to focus on the legitimate interests of crime victims … ." [116] Given Congress's clear intent to change a hostile legal culture, it makes no sense to leave victims to the mercies of litigation to determine the scope of their rights.

For all these reasons, the Federal Rules of Criminal Procedure should be amended not only to implement the narrow rights articulated in the ***CVRA*** but also its more open-ended rights, particularly the victim's right to be treated with fairness.

IV. Specific Rule Changes to Comply with the ***CVRA***

Against the backdrop of the statutory command that victims should be treated with fairness, the balance of this Article will compare my specific proposals for amending the Rules with those of the Advisory Committee - attempting to show the strong points of my ideas. For convenience, the Article proceeds sequentially through the Rules from beginning to end, relying in the case of proposed ***amendments*** on the Advisory Committee's numbering.

Rule 1 - Definition of "Victim" and "Victim's Representative" The Proposals:

I proposed amending Rule 1 to include a definition of victim and the victim's representatives as follows:

"Victim" means a person directly and proximately harmed as a result of the commission of a federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may **[*881]** assume the crime victim's rights under these rules, but in no event shall the defendant be named as such guardian or representative. [117]

The Advisory Committee instead proposed to cross-reference the statutory definition of "crime victim" as follows:

"Victim" means a "crime victim" as defined in *18 U.S.C. § 3771*(e). A person accused of an offense is not a victim of that offense. [118]

Discussion:

The rules should be amended to make clear that both a victim and the victim's representative can assert the victim's rights. As an effort in that direction, I proposed amending Rule 1 to include a definition of "victim" as well as a definition of "victim's lawful representative." [119] My definitions were lifted from the ***CVRA***. [120] In response, the Advisory Committee agreed to include a definition of "victim" but left to an Advisory Committee Note the reference to the victim's representative. [121]

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[115] 150 Cong. Rec. S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[116] 150 Cong. Rec. S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[117] Cassell, Proposed ***Amendments***, supra note 4, at 856-57.

[118] Proposed ***Amendments***, supra note 71, R. 1(b)(11), at 1.

[119] Cassell, Proposed ***Amendments***, supra note 4, at 852, 856-57.

[120] See *18 U.S.C. § 3771*(e) (2006); see also *United States v. Sharp, 463 F. Supp. 2d 556, 558 (E.D. Va. 2006)* (person harmed by former domestic partner of marijuana user was not "victim" entitled to provide victim impact statement pursuant to ***CVRA***).

The differences between the two approaches might seem modest until one recognizes that another provision in the Advisory Committee's proposals appears to intentionally omit any reference to a victim representative. Proposed Rule 60, the Advisory Committee's "global" provision dealing with victims' rights, explains who may enforce victims' rights. [122] In clear contrast to the ***CVRA***'s governing provision, this proposed rule omits any reference to a crime victim's representative. Proposed Rule 60 provides only that "the rights of a victim under these rules may be asserted by the victim and the attorney for the government." [123] In contrast, the ***CVRA*** enforcement provision states: "The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a)." [124] Nothing in the Advisory Committee Notes indicates that a crime victim's representative is among those authorized to assert the rights. The Advisory Committee also struck existing **[*882]** language in the Rules about a victim's representative exercising the victim's right to speak at sentencing. [125]

The repeated omission of any reference to a victim's representative is unsettling given the Advisory Committee's promise to simply track the ***CVRA***'s language. [126] Its failure to track the language here leaves the impression that the Advisory Committee is uncomfortable with a victim's representative asserting rights. Perhaps the Committee could make a policy argument against such representation, but Congress has said victims have the right to have representatives speak for them. The Federal Rules should follow the ***CVRA*** and state clearly that a victim's representative can assert a victim's rights.

The need for clarity on this point is heightened by pre-***CVRA*** caselaw questioning any right by a victim's representative to assert victims' rights. Most notably, in one of the Oklahoma City bombing prosecutions, the Tenth Circuit rebuked a trial judge for permitting an attorney for the bombing victims to participate in oral argument at a sentencing hearing. [127] The Circuit stated that "in the absence of any authority permitting the participation of victims' counsel, we harbor concerns about the propriety of the district court's rulings." [128] This statement can no longer be regarded as good law in light of the ***CVRA***'s commands. [129]

Another reason for clarity is to make sure that corporate and organizational victims are able to be heard in the process. The ***CVRA***'s definition of victim - "a person directly and proximately harmed as a result of the commission of a Federal offense" [130] - is essentially lifted from federal restitution statutes. [131] Federal courts have consistently held that a "person" entitled to restitution includes corporate entities. [132] Of course, such legal entities cannot appear personally but only through **[*883]** a

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[121] For subsequent developments on this issue, see infra notes 578-579 and accompanying text.

[122] Proposed ***Amendments***, supra note 71, R. 60, at 16-18.

[123] *Advisory Committee Report, supra* note 69, at 16.

[124] *18 U.S.C. § 3771*(d)(1) (2006) (emphasis added).

[125] See Proposed ***Amendments***, supra note 71, R. 32(i)(4)(B)(i)-(ii), at 13-14 (deleting language confirming permission for parent or legal guardian to exercise right to speak at sentencing for minor and incapacitated victims).

[126] See, e.g., *Advisory Committee Report, supra* note 69, at 1 ("The Subcommittee concluded that the Rules should incorporate, but not go beyond, the specific statutory provisions [in the ***CVRA***].").

[127] *United States v. Fortier, 242 F.3d 1224, 1230 (10th Cir. 2001).* In the interest of full disclosure, I was the attorney in question.

[128] Id.

[129] See *United States v. Degenhardt, 405 F. Supp. 2d 1341, 1343 n.7 (D. Utah 2005)* (noting that Fortier has now been overruled by statute).

[130] *18 U.S.C. § 3771*(e) (2006) (emphasis added).

[131] See *18 U.S.C. § 3663*(a)(2); id. § 3663A(a)(2).

[132] See, e.g., *United States v. Martin, 128 F.3d 1188, 1191 (7th Cir. 1997)* (collecting cases); *United States v. Hand, 863 F.2d 1100, 1104 (3d Cir. 1988)* (it makes no sense to say that "if General Motors or Chase Manhattan Bank had funds stolen, in violation of federal criminal law, a

representative. To eliminate any doubt about the ability of corporate entities to assert their interests, the Rules should be amended to clearly state that a victim's representative can enforce victims' rights. [133]

Rule 2 - Fairness to Victims The Proposals:

I proposed amending Rule 2 to require fairness to victims in construing the Rules as follows:

These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration to the government, defendants, and victims, and to eliminate unjustifiable expense and delay. [134]

The Advisory Committee did not propose amending Rule 2. [135]

Discussion:

To assure that crime victims are treated fairly throughout the process, it makes sense to add language incorporating crime victims in Rule 2 - the one rule that specifically mentions fairness. As discussed in the previous Part of this Article, the Advisory Committee does not agree that the Rules should be amended to protect a victim's right to fairness and for this reason, presumably, declined to amend Rule 2. The qualifier "presumably" is needed here because the ***CVRA*** Subcommittee did not give an explanation for declining to follow my recommendation here. [136]

The fairness issues appears to be the fundamental difference between my approach and the Advisory Committee's approach - the Rules are either going to treat crime victims fairly or not. As discussed in the previous Part of this Article, they should.

But even those who share my view on fairness might nonetheless argue that Rule 2 need not be amended because it is an interpretive rule with no substantive effect. After all, it could be argued, the rule simply calls for a "just determination" of criminal cases, arguably a symbolic command. And, in any event, that command might be flexible enough to encompass crime victims.

[*884] The debate about how Rule 2 ought to read is, however, about more than symbols. In 1946, the initial chairman of the Advisory Committee called Rule 2 "the most important rule of the whole set." [137] Rule 2 has been cited by a number of courts, [138] including the Supreme Court. [139] Rule 2 has consequences. Not only does it "set[] forth a principle of interpretation" for

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judge could not require the wrongdoers to pay restitution … ."); *United States v. Kirkland, 853 F.2d 1243, 1246 (5th Cir. 1988)* ("Non-human entities … can be "victims' entitled to restitution … ."); see also *United States v. Lincoln, 277 F.3d 1112, 1113-14 (9th Cir. 2002)* (discussing *18 U.S.C. § 3664,* which specifically recognizes the United States as a possible victim for restitution purposes).

[133] The National Association of Criminal Defense Lawyers has proposed adding a "factfinding" hearing for determining who qualifies as a victim under the ***CVRA***. This novel and cumbersome proposal is discussed below. See infra notes 546-547 and accompanying text (discussing Proposed Rule 60(b)).

[134] Cassell, Proposed ***Amendments***, supra note 4, at 858.

[135] Proposed ***Amendments***, supra note 71.

[136] See ***CVRA*** *Subcommittee Report, supra* note 66, at 17-20 (listing Cassell proposals not adopted; Rule 2 proposal not listed).

[137] Vanderbilt, N.Y.U Institute of Federal Rules of Civil Procedure, at 120 (1946), quoted in 1 Charles Alan Wright, Federal Practice and Procedure: Criminal § 32, at 30 n.1 (3d ed. 1999).

[138] See, e.g., *United States v. Gupta, 363 F.3d 1169,1174 (11th Cir. 2004); United States v. Navarro, 169 F.3d 228, 237 (5th Cir. 1999);* ***United States v. Price, 13 F.3d 711, 723 (3d Cir. 1994);*** *United States v. Giovannetti, 928 F.2d 225, 226 (7th Cir. 1991); United States v. Campbell, 845 F.2d 1374, 1378 (6th Cir. 1988); United States v. Green, 847 F.2d 622, 625 (10th Cir. 1988); United States v. Hillard, 701 F.2d 1052, 1061 (2d Cir. 1983),* cert. denied ***461 U.S. 958 (1983);*** *United States v. Broadus, 664 F. Supp. 592, 596-98 (D.D.C. Cir. 1987); United States v. Pers. Fin. Co. of N.Y., 13 F.R.D. 306, 311 (S.D.N.Y. 1952).*

[139] See *Carlisle v. United States, 517 U.S. 416, 424, 431 (1996).*

ambiguous rules, but the Court has used it as a basis for deviating from the Rules in some circumstances. [140] Indeed, in some lower court cases, Rule 2 has proven outcome determinative. For example, in United States v. Broadus, the United States District Court for the District of Columbia used Rule 2 as a basis for deviating from the time limits imposed by Rule 29(c) for the defendant to seek a new trial. [141] Relying on Rule 2, the court determined that "a seemingly plausible inference from a criminal rule cannot command blind adherence if it would deprive an accused person … of a just determination of his or her cause." [142] Using Rule 2 to protect defendants' legitimate interests seems entirely proper. But crime victims need the same textual support to secure their legitimate interests.

Not only is Rule 2 important, directly including crime victims in the language is important as well. Courts are used to resolving disputes between prosecutors and defendants, not considering the interests of crime victims. [143] That problem is, indeed, the whole reason for the passage of the ***CVRA***. As Senator Feinstein has explained, "In case after case we found victims and their families were ignored, cast aside, and treated as non-participants in a critical event in their lives. They were kept in the dark by … judges focused on defendant's rights, and by a court system that simply did not have a place for them." [144] For all these reasons, Rule 2 should be amended to make clear that the Rules must be construed to be fair not only to the parties, but also to victims.

[*885] Rule 11(a)(3) - Victims' Views on Nolo Contendere Pleas The Proposals:

I proposed requiring courts to consider a victim's view before accepting any nolo contendere plea as follows:

Nolo Contendere Plea. Before accepting a plea of nolo contendere, the court must consider the parties' and victims' views and the public interest in the effective administration of justice. [145]

The Advisory Committee proposed no change to the rule. [146]

Discussion:

It is unclear why the Advisory Committee declined to change Rule 11 to require courts to consider victims' views on nolo pleas. The ***CVRA*** Subcommittee purported to catalog and briefly discuss all of my proposals that the subcommittee declined to recommend to the full Committee. Inexplicably, my Rule 11(a)(3) proposal (along with my other Rule 11 proposals) was not mentioned [147] and, thus, there is nothing in the available records to indicate that the Advisory Committee considered it. Possibly the reason the Advisory Committee did not recommend this change was simply oversight.

Perhaps the Advisory Committee was relying on its "global" rule on victims' rights (Rule 60) which provides that "the court must permit a victim to be reasonably heard at any public proceeding in the district court concerning … [a] plea … involving the crime." [148] But that rule deals solely with the subject of being "heard." Once the court has heard the victim, the question

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[140] See *id. at 424-25* (referring to *Fallen v. United States, 378 U.S. 139 (1964)).*

[141] *664 F. Supp. at 598.*

[142] *Id. at 596-97.*

[143] See, e.g., Beloof, supra note 6, at 289 (noting "state of denial" about crime victims' rights by institutional actors); Russell P. Butler, What Practitioners and Judges Need to Know Regarding Crime Victims' Participatory Rights in Federal Sentencing Proceedings, 19 Fed. Sent'g Rep., Oct. 2006, at 21, 21 (noting that the ***CVRA*** heralds a "new era" for crime victims' rights).

[144] 150 Cong. Rec. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[145] Cassell, Proposed ***Amendments***, supra note 4, at 866.

[146] Proposed ***Amendments***, supra note 71.

[147] ***CVRA*** Subcommittee Memo, supra note 66, at 17-20.

[148] Proposed ***Amendments***, supra note 71, R. 60(a)(3), at 16.

remains what the court should do with the victim's statement. Currently Rule 11(a)(3) specifies that the court must consider "the parties'" views on a nolo plea - but it makes no mention of the victim's views. [149] The ***CVRA*** now mandates that victims must be "reasonably heard" at any proceeding involving a "plea." [150] It is hard to see how anyone could argue that a victim is reasonably heard when, after making a **[*886]** statement about the nolo plea, the court is not required to even consider it. The rule should be amended to require courts to consider victims' statements.

Rule 11(b)(4) - Victims' Right To Be Heard on Pleas

The Proposals:

I proposed that the court should be required to address any victim present when a plea is taken to determine whether the victim wishes to make a statement and to consider the victim's view before accepting a plea, as follows:

Victims' Views. Before the court accepts a plea of guilty or nolo contendere or allows any plea to be withdrawn, the court must address any victim who is present personally in open court. During this address, the court must determine whether the victim wishes to present views regarding the proposed plea or withdrawal and, if so, what those views are. The court shall consider the victim's views in acting on the proposed plea or withdrawal. [151]

The Advisory Committee recommended no change to Rule 11. [152]

Discussion:

It is hard to understand why the Advisory Committee declined to recommend changing Rule 11 to require that victims be addressed, as it did not discuss the idea. [153] If the Advisory Committee deliberately rejected this idea, it has given no explanation and it is hard to see any justification for the Advisory Committee's position. The ***CVRA*** gives victims "the right to be reasonably heard at any public proceeding in the district court involving … [a] plea." [154] To implement the victim's right to be heard regarding a plea, my proposed rule change merely required the court to directly address any victim who is present in court and to consider any views the victim expressed. This is consistent with the ***CVRA***'s legislative history which explains that "this provision is intended to allow crime victims to directly address the court in person." [155] The language of the proposed rule is lifted from an earlier paragraph in Rule 11, which requires the court "before accepting a plea of guilty" to "address the defendant personally in open court." [156] Victims should be treated evenhandedly with defendants. It may also be important for the judge to address victims directly because many victims will lack **[*887]** the assistance of counsel. Untrained in legal proceedings, victims may be uncertain about exactly when in the process they should present their views. Having the court address the victim will eliminate that uncertainty and ensure that the victim's right to be heard is vindicated.

The Advisory Committee's "global" rule on victims' rights (Rule 60) does briefly address pleas. Tracking language in the ***CVRA***, the Advisory Committee would require the court to "permit a victim to be reasonably heard at any public proceeding …

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[149] The rule does mention that the court must consider "the public interest in the effective administration of justice" in reviewing a nolo plea. See *Fed. R. Crim. P. 11(a)(3)*. But this broad phrase does not appear to encompass the views of particular actors regarding a plea, as made clear by the fact that the rule separately lists "the parties' views" as something the court must consider.

[150] *18 U.S.C. § 3771*(a)(4) (2006).

[151] Cassell, Proposed ***Amendments***, supra note 4, at 866.

[152] Proposed ***Amendments***, supra note 71.

[153] See supra note 145-147 and accompanying text (noting the absence of any mention of my Rule 11 proposals as those the subcommittee rejected).

[154] *18 U.S.C § 3771*(a)(4).

[155] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[156] *Fed. R. Crim. P. 11(b)(2)*.

concerning … [a] plea." [157] But this brief mention in the rule is inferior to my specific proposal for several reasons. First, Rule 11 is the "script" when federal judges accept guilty pleas. Victims should be directly included here so that judges do not inadvertently overlook victims' rights. Second, stating only that victims may be "reasonably heard" regarding a plea, without explaining how that will occur, invites litigation and uncertainty. For example, is a victim reasonably heard when allowed to be heard only through written submission? [158] Is a victim treated "fairly" if the court is required to address the defendant in open court but not to address the victim? If the court does not address the victim, when should the victim try to interrupt the proceedings to be heard? Should the victim's views enter into the court's calculation about whether to accept the plea? All of these questions are answered in a simple and straightforward way by my proposal - a proposal which the Advisory Committee should adopt.

Rule 11(c)(1) - Prosecution To Consider Victims' Views on Pleas The Proposals:

I proposed that the prosecution should be required to consider victims' views in developing any proposed plea arrangement as follows:

(1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. The attorney for the government shall make reasonable efforts to notify identified victims of, and consider the victims' views about, any proposed plea negotiations. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, **[*888]** the plea agreement may specify that an attorney for the government will … [listing various options]. [159]

The Advisory Committee did not recommend any change. [160]

Discussion:

My proposed change required prosecutors to make reasonable efforts to notify victims about pleas and to consider the victims' views regarding pleas. This requirement was taken almost verbatim from the Attorney General Guidelines for Victim and Witness Assistance, which already directs prosecutors to "make reasonable efforts to notify identified victims of, and consider victims' views about, prospective plea negotiations." [161] According to the Department of Justice, "twenty-nine states [already] require prosecutors to "consult with' or "obtain the views of' victims at the plea agreement stage." [162]

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[157] Proposed ***Amendments***, supra note 71, R. 60(a)(3), at 15-16.

[158] Compare *United States v. Degenhardt, 405 F. Supp. 2d 1341, 1345-46 (D. Utah 2005)* (finding that a victim must be heard orally at sentencing), and *United States v. Turner, 367 F. Supp. 2d 319, 333 (E.D.N.Y. 2005)* (noting in dicta that § 3771(a)(4) "requires the victim to be given an opportunity actually to be "heard' rather than afforded some alternate means of communicating her views") (emphasis in original), with *United States v. Marcello, 370 F. Supp. 2d 745, 749 (N.D. Ill. 2005)* (holding that "in detention hearings, the victim's right to be reasonably heard does not mandate oral statements, particularly when the [victim] has no personal knowledge of the guilt of the defendant(s) and offers an opinion only on a matter that is not in dispute").

[159] Cassell, Proposed ***Amendments***, supra note 4, at 868.

[160] Proposed ***Amendments***, supra note 71.

[161] U.S. Dep't of Justice, Office for Victims of Crime, Attorney General Guidelines for Victim and Witness Assistance 30 (2005) (defining what can be considered in determining whether notice is reasonable in a particular case) [hereinafter Dep't of Justice, Attorney General Guidelines]; see also U.S. Dep't of Justice, Office for Victims of Crime, New Directions from the Field: Victims' Rights and Services for the 21st Century 87 (1997) ("Prosecutors should make every effort … to consult with the victim on the terms of any negotiated plea … .") [hereinafter Dep't of Justice, New Directions from the Field].

[162] Dep't of Justice, New Directions from the Field, supra note 161, at 75 (quoting National Victims' Center, 1996 Victim's Rights Sourcebook: A Compilation of Victim's Rights Laws, Arlington, VA: National Victim Center, 1997 § 5).

Perhaps the Advisory Committee overlooked this proposed change. [163] Yet it is important, implementing not only a victim's right to be heard at plea proceedings but also the rights to "confer with the attorney for the government" [164] and to be "treated with fairness." [165] Given that victims have the right to confer, the conferring should take place at the most salient points in the process. As Senator Feinstein explained, "This right [to confer] is intended to be expansive. For example, the victim has the right to confer with the Government concerning any critical stage or disposition of the case." [166] Because the overwhelming majority of federal criminal cases are resolved by a plea, a conference between the victim and the prosecutor regarding the plea will be critical in most cases. Reflecting that fact, the Rules should follow the approach of the majority of states in directing prosecutors to consult with victims about pleas.

[*889] Rule 11(c)(2) - Court to Be Advised of Victim Objections to Plea The Proposals:

I proposed that prosecutors and victims' attorneys should be required to advise the court whenever they are aware that the victim objects to a proposed plea agreement as follows:

(2) Disclosing a Plea Agreement. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera. When a plea is presented in open court, the attorney for the government or the attorney for any victim shall advise the court when the attorney is aware that the victim has any objection to the proposed plea agreement. [167]

The Advisory Committee proposed no change to this rule. [168]

Discussion:

In circumstances where an attorney, either for the government or for the victim, is aware of a victim's objection to a plea, that information should be relayed to the court. The victim's attorney will, no doubt, do this on her own initiative. The rule is intended to clarify that the prosecutor is under an equal obligation to communicate this information to the court.

While the Advisory Committee may have overlooked this proposal, [169] the change is necessary because the ***CVRA*** implicitly obligates prosecutors to communicate a victim's objection to the court. The ***CVRA*** commands that prosecutors use their "best efforts" to enforce victims' rights. [170] Victims are often untrained in the law and unexpectedly thrust into criminal proceedings; they may well believe that prosecutors automatically relay their objections to the plea to the court. The proposed rule avoids confusion by requiring the prosecutor to notify the court of a victim's concern. The rule is limited to situations where the prosecutor is aware of an objection.

This approach is consistent with the leading case of State v. Casey, [171] which considered whether a victim's request to be heard regarding a plea made to the **[*890]** prosecutor was sufficient to trigger the victim's constitutional right to be heard. [172] In

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[163] See supra note 147 and accompanying text (noting listing of Cassell proposals rejected; Rule 11 proposals not listed).

[164] *18 U.S.C. § 3771*(a)(5) (2006).

[165] Id. § 3771(a)(8).

[166] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[167] Cassell, Proposed ***Amendments***, supra note 4, at 869.

[168] Proposed ***Amendments***, supra note 71.

[169] See supra note 147 and accompanying text (noting listing of Cassell proposals rejected; Rule 11 proposals not mentioned).

[170] *18 U.S.C. § 3771*(c)(1) (2006).

[171] *2002 UT 29, 44 P.3d 756.* I served as pro bono counsel for the victim in the case.

[172] See generally Nicole G. Farrell, Recent Developments, A Victim's Right To Be Heard Under the Victims' Rights ***Amendment***, The Victims' Right Act, and the Rights of Crime Victims Act, *2003 Utah L. Rev. 716* (summarizing impacts of case on Utah law).

Casey, the victim told the prosecutor that she wished to be heard in opposition to a plea. The prosecutor refused to convey that information to the court and the trial judge accepted the plea. When the issue reached the Utah Supreme Court, the court concluded that the prosecutor had an ethical obligation as an officer of the court to convey that information to the judge:

Prosecutors must convey such requests [to be heard] because they are obligated to alert the court when they know that the court lacks relevant information. This duty, which is incumbent upon all attorneys, is magnified for prosecutors because, as our case law has repeatedly noted, prosecutors have unique responsibilities… . The prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest … in a criminal prosecution is not that it shall win … but that justice shall be done. [173]

Applying the reasoning of Casey to analogous rights in the ***CVRA***, federal prosecutors must, as officers of the court, convey a victim's request to be heard regarding a plea. Indeed, the prosecutor should convey not only that request to be heard but also the fact that the victim has an objection to the plea. In deciding whether to accept a plea, the court must consider the public interest. [174] As the Courts of Appeals have explained, ""Rule 11 also contemplates the rejection of a negotiated plea when the district court believes that bargain is too lenient, or otherwise not in the public interest.'" [175] When the prosecutor is aware of an objection from a keenly interested member of the public - the victim - the court should not be left in the dark about it, as provided in my proposed rule. [176]

[*891] Rules 12.1 and 12.3 - Victim Addresses and Phone Numbers Not Disclosed for Alibi and Public-Authority Defense Purposes The Proposals:

Rule 12.1 currently requires the government to disclose the address and telephone numbers of any witness, including any victim, that it plans to use to disprove a defendant's alibi. I proposed amending Rule 12.1 to protect the victim's privacy, by excluding their addresses and telephone numbers from this requirement as follows:

(a) Government's Request for Notice and Defendant's Response.

(1) Government's Request. An attorney for the government may request in writing that the defendant notify an attorney for the government of any intended alibi defense. The request must state the time, date, and place of the alleged offense.

(2) Defendant's Response. Within 10 days after the request, or at some other time the court sets, the defendant must serve written notice on an attorney for the government of any intended alibi defense. The defendant's notice must state:

(A) each specific place where the defendant claims to have been at the time of the alleged offense;

(B) the name, address, and telephone number of each alibi witness and the address and telephone number of each witness (other than a victim) on whom the defendant intends to rely. [177]

(b) Disclosing Government Witnesses.

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[173] *Casey, 2002 UT 29, P 32, 44 P.3d at 764* (internal citations omitted) (quoting *State v. Emmett, 839 P.2d 781, 787 (Utah 1992)).*

[174] See, e.g., *United States v. Bean, 564 F.2d 700, 704 (5th Cir. 1977)* (stating that discretion of the court includes license to reject plea deals that are against public interest).

[175] *United States v. Carrigan, 778 F.2d 1454, 1462 (10th Cir. 1985)* (emphasis added) (quoting *United States v. Miller, 722 F.2d 562, 563 (9th Cir.1983)).*

[176] For alternative ways of drafting this rule, see Cassell, Proposed ***Amendments***, supra note 4, at 871-72 (noting that several states require courts to inquire of prosecutors whether the victim has been advised of the proposed plea and whether the victim wishes to make a statement concerning it).

[177] This ***amendment*** to rule 12.1(a)(2)(B) was not in my previous proposal. See Cassell, Proposed ***Amendments***, supra note 4 at 872-73. It is included here for the reasons discussed infra at note 213 and accompanying text.

(1) Disclosure. If the defendant serves a Rule 12.1(a)(2) notice [regarding intent to present an alibi defense], an attorney for the government must disclose in writing to the defendant or [178] the defendant's attorney:

(A) the name, address, and telephone number of each witness and the address and telephone number of each witness (other than a victim) that the government intends to rely on to establish the defendant's presence at the scene of the alleged offense; and

(B) each government rebuttal witness to the defendant's alibi defense.

[*892] (2) Time to Disclose. Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within 10 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 10 days before trial.

(c) Continuing Duty to Disclose. Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of each additional witness, and the address and telephone number of each additional witness (other than a victim) if:

(1) the disclosing party learns of the witness before or during trial; and

(2) the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had known of the witness earlier. [179]

In addition, I proposed making a similar change to Rule 12.3 "regarding the address and telephone number of victims who will be used to disprove a public-authority defense." [180]

The Advisory Committee proposed more limited protection for victims' addresses and telephone numbers:

(b) Disclosing Government Witnesses.

(1) Disclosure.

(A) In general. If the defendant serves a Rule 12.1(a)(2) notice, an attorney for the government must disclose in writing to the defendant or the defendant's attorney:

(i) (A) the name, address, and telephone number of each witness and the address and telephone number of each witness (other than a victim) that the government intends to rely on to establish the defendant's presence at the scene of the alleged offense; and

(ii) (B) each governmental rebuttal witness to the defendant's alibi defense.

(B) Victim's Address and Telephone Number. If the government intends to rely on a victim's testimony to establish the defendant's presence at the scene of the alleged offense and the defendant establishes a need for the victim's address and telephone number, the court may:

(i) order the government to provide the information in writing to the defendant or the defendant's attorney; or

[*893] (ii) fashion a reasonable procedure that allows the preparation of the defense and also protects the victim's interests.

. . . .

(c) Continuing Duty to Disclose.

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[178] The excision of the phrase "the defendant or" was not in my previous proposal. See Cassell, Proposed ***Amendments***, supra note 4, at 872. It is included here for reasons discussed infra at note 190 and accompanying text.

[179] Cassell, Proposed ***Amendments***, supra note 4, at 873.

[180] Id.

(1) In General. Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name, of each additional witness and the address, and telephone number of each additional witness - other than a victim - if:

(A) (1) the disclosing party learns of the witness before or during trial; and

(B) (2) the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had known of the witness earlier.

(2) Address and Telephone Number of an Additional Victim Witness. The telephone number and address of an additional victim witness must not be disclosed except as provided in (b)(1)(B).

(d) Exceptions. For good cause, the court may grant an exception to any requirement of Rule 12.1(a)-(c). [181]

The Advisory Committee also proposed adding an Advisory Committee Note as follows:

Subdivisions (b) and (c). The ***amendment*** implements the Crime Victims' Rights Act, which states that victims have the right to be reasonably protected from the accused, and to be treated with respect for the victim's dignity and privacy. See *18 U.S.C. § 3771*(a)(1) & (8). The rule provides that a victim's address and telephone number should not automatically be provided to the defense when an alibi defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense, but also protects the victim's interests. For example, the court might authorize the defendant and his counsel to meet with the victim in a manner and place designated by the court, rather than giving the defendant the name and address of a victim who fears retaliation if the defendant learns where he or she lives.

In the case of victims who will testify concerning an alibi claim, the same procedures and standards apply to both the prosecutor's initial **[*894]** disclosure and the prosecutor's continuing duty to disclose under subdivision (c). [182]

Discussion:

The Advisory Committee agrees with me that the current rule providing that a victim's address and telephone number be automatically disclosed whenever an alibi is at stake conflicts with the ***CVRA***. [183] This information can often be very sensitive for a crime victim, as it could allow the defendant to find and harm a victim. The difference between our proposals is that I would strike the requirement that a victim's address and telephone number be disclosed to the defense while the Advisory Committee would add specific language allowing a court to order production of the address and telephone number based on a defense showing of "need." [184]

The Advisory Committee's approach highlights an inconsistency in the way it handles defendants' and victims' interests. It has chosen to spell out in the Rules how a defendant can obtain access to a victim's address and telephone number. Of course, if the Constitution or a statute already requires the prosecutor to turn over that personal information, any rule is irrelevant. Presumably, the reason that the Advisory Committee added the language is because it knows that the language is not irrelevant - that is, that the Constitution and statute do not always require production of this information. [185] Obviously, nothing is wrong with the Advisory Committee drafting rules that go beyond the Constitution and statutes to protect defendants' legitimate interests. That approach is, indeed, commendable. What is wrong is for the Committee to work through its rules to make sure

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[181] Proposed ***Amendments***, supra note 71, R. 12.1, at 2-6 (footnote omitted).

[182] Proposed ***Amendments***, supra note 71, R. 12.1, at 6 (footnote omitted).

[183] Compare Cassell, Proposed ***Amendments***, supra note 4, at 872, with Proposed ***Amendments***, supra note 71, R. 12.1.

[184] Compare Cassell, Proposed ***Amendments***, supra note 4, at 872-73, with Proposed ***Amendments***, supra note 71, R. 12.1(b)(1)(B), at 3-4 (footnote omitted).

[185] See generally infra notes 297-324 and accompanying text (reviewing case law establishing that criminal defendants lack any relevant constitutional or statutory right to discovery).

defendants are treated fairly - even in the absence of an overarching statutory command to that effect - while not doing the same for crime victims, even where the ***CVRA*** directly commands that victims be treated "with fairness." [186]

In any event, the Advisory Committee's proposal is decidedly unfair. The Committee proposes a two-pronged approach:

If the government intends to rely on a victim's testimony to establish the defendant's presence at the scene of the alleged offense and the defendant establishes a need for the victim's address and telephone number, the court may:

[*895] (i) order the government to provide the information in writing to the defendant or the defendant's attorney; or

(ii) fashion a reasonable procedure that allows the preparation of the defense and also protects the victim's interests. [187]

Notice that the court can order disclosure of the victim's address upon a mere showing by the defendant of "a need," by proceeding under subparagraph (i) of the proposed rule; the requirement to protect the victim's interests is triggered only if the court chooses to proceed under paragraph (ii). And the proposed rule fails to give any guidance on when the court should proceed under paragraph (ii) as opposed to paragraph (i).

The Advisory Committee's provision for two ways in which the court can avoid the requirements of withholding a victim's name seems unnecessary. Subsection (d) of Rule 12.1 already allows a court to grant an exception to any of the requirements of the rule for "good cause." [188] This exception has been used to justify the government's nondisclosure of its witnesses in situations where their safety might be jeopardized. [189] There is, accordingly, no need to add "wiggle room" language in Rule 12.1.

More important, the Advisory Committee's approach is fundamentally flawed. It makes no sense to require that the victim's interests be considered only half the time - i.e., only where the court proceeds under paragraph (ii) but not under paragraph (i). More important, since the Advisory Committee appears to agree that disclosing a victim's address raises obvious safety concerns, allowing disclosure without any consideration of the victim's interests violates the ***CVRA***'s command that the victim must be "reasonably protected from the accused." [190] A court proceeding under paragraph (i) would be under no obligation to "protect[] the victim's interests" (as paragraph (ii) specifically provides), since it is a standard rule of construction that expressio unius est exclusio alterius (the expression of one thing implies the exclusion of the other). [191] At a bare minimum, the ***CVRA*** requires redrafting the rule so that the court always considers victims' interests before it can order production of a victim's address.

Also interesting are the choices that the Advisory Committee specifically lists for a judge. The options given are (i) "order the government to provide the information in writing" or (ii) "fashion a reasonable procedure that allows the preparation of the defense and also protects the victim's interests." The listing of these two (and only these two) options seems to imply that the court does not have **[*896]** a third option - i.e., (iii) decline to order a victim's address be turned over. It is simply not the case that every time the defendant can establish a "need" for information - no matter how trivial or how remotely connected to the case - the court should either disclose a victim's address or fashion some other procedure toward the same end.

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[186] *18 U.S.C. § 3771*(a)(8) (2006).

[187] Proposed ***Amendments***, supra note 71, R. 12.1(b)(1)(B), at 3-4 (footnote omitted).

[188] *Fed. R. Crim. P. 12(d)*.

[189] See, e.g., *United States v. Causey, 834 F.2d 1277, 1282 (6th Cir. 1987)* (noting that, in light of Rule 12(d), any penalty for violating the rule is "neither mandatory nor absolute" (quoting *United States v. Carter, 756 F.2d 310, 311 (3d Cir. 1985))).*

[190] *18 U.S.C. § 3771*(a)(1) (2006).

[191] See, e.g., *Swanson v. United States, 224 F.2d 795, 798 (9th Cir. 1955)* (applying the principle of expressio unius est exclusio alterius when constructing *Fed. R. Crim. P. 46(f)(1)*).

Even where the defendant can establish need, it may be the case that victims' safety interests will prevail. For example, in United States v. Wills, the district court allowed the government to delay the disclosure of the name of a witness because the witness feared for her safety and the defendant had a violent history. [192] On appeal to the Ninth Circuit, the defendant sought reversal of his conviction, arguing that "the district court abused its discretion in finding good cause to permit the government to withhold [the witness] from its alibi rebuttal list and witness list." [193] Before his trial, Wills had provided the government with the name of one alibi witness. In response, the government filed a sealed, ex parte application under Rule 12.1(e) seeking an exception to its obligation to disclose its alibi rebuttal witness to the defense. [194] Based on the defendant's violent history and apparent ability to "induce others to commit crimes on his behalf," the court allowed the government to delay the disclosure of the witness. [195]

The Wills court noted that two other circuits had addressed or commented on the issue. The ***Sixth*** Circuit, in United States v. Causey, held that good cause existed to justify the nondisclosure of a witness to the defense. [196] The Causey court found evidence in the record indicating that witnesses were being threatened in an attempt to prevent them from testifying. [197] "In such a situation, the physical safety and protection of potential witnesses constitutes a proper consideration of a trial court in determining whether good cause exists to justify nondisclosure of witnesses to opposing counsel and thus noncompliance with Rule 12.1." [198] Similarly, in United States v. Elizondo, the Seventh Circuit cited Causey for the proposition that the protection of potential witnesses could justify postponing disclosure. [199] Following the reasoning of the ***Sixth*** and Seventh Circuits, Wills held that the "district court did not abuse its discretion in finding that good cause existed to authorize the Government to delay disclosure of [the witness's] identity." [200]

The Advisory Committee might respond to these criticisms of its proposal by pointing to discretionary language; the proposed rule states that the court "may" order production of the evidence or the fashioning of an alternative procedure. But given the obvious safety concerns that attend disclosure of the victim's home **[*897]** address to the defense, the Advisory Committee should exercise extreme caution. More important, courts have no discretion to ignore the commands of the ***CVRA***. Courts must always protect a victim's right "to be reasonably protected from the accused." [201] The proposed rule does not faithfully implement that instruction. Indeed, the safety problems attendant to the Advisory Committee's proposal are heightened by fact that disclosure is authorized to "the defendant or the defendant's attorney." It does not take a great deal of imagination to foresee problems arising from telling criminal defendants where the victims who will testify against them live. In fairness to the Advisory Committee, it was only tracking language used elsewhere in Rule 12. [202] All of Rule 12 should be redrafted to require disclosure only to defense counsel, rather than to the defendant personally. [203]

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[192] *88 F.3d 704, 710 (9th Cir. 1996).*

[193] *Id. at 708* (internal quotation marks omitted).

[194] *Id. at 709.*

[195] *Id. at 710.*

[196] *834 F.2d 1277, 1281 (6th Cir. 1987)*

[197] *Id. at 1282.*

[198] Id.

[199] *920 F.2d 1308, 1314 (7th Cir. 1990).*

[200] *88 F.3d at 710.*

[201] *18 U.S.C. § 3771*(a)(1) (2006).

[202] See, e.g., *Fed. R. Crim. P. 12(a)(3)*.

[203] Of course, if the defendant were acting pro se, then he would be counsel in the matter. See *Faretta v. California, 422 U.S. 806 (1975).*

This may be a convenient place to highlight another defect in the Advisory Committee's proposal - crime victims have no right to be heard on whether their address should be given to the defendant. As discussed shortly, [204] I had originally proposed allowing victims to be heard "on any matter directly affecting a victim's right" - for example, whether disclosing a victim's home address violates the victim's right to reasonable protection. The Advisory Committee waters down that proposal, recommending only that the victim must "be reasonably heard at any public proceeding in the district court concerning release, plea, or sentencing involving the crime." [205] Under the Advisory Committee's formulation, therefore, crime victims would seem to have no right to be heard on disclosure of their address. This is not a matter concerning "release, plea, or sentencing" and, in many cases, this issue will be decided by written pleadings rather than in a "public proceeding." Nothing better illustrates the unfairness of the Advisory Committee's proposals and their illegality under the ***CVRA*** than its refusal to guarantee that crime victims will be heard on the subject of whether their home address will be turned over to the defendants accused of victimizing them.

Compounding all these problems is one more: The Advisory Committee appears to encourage the use of crime victim depositions or other face-to-face meetings between victims and defendants. In its proposed note to the amended rule, the Advisory Committee describes as one possible procedure for dealing with a defense request for a victim's home address that "the court might authorize the defendant and his counsel to meet with the victim in a manner and place designated by the court, rather than giving the defendant the name and address of victim." [206] This note raises a host of problems. Most importantly, a federal court lacks jurisdiction to require a crime victim to appear at a face-to-face, pretrial **[*898]** meeting with the defendant. The "federal courts are courts of limited jurisdiction," [207] and federal judges have no general power to compel private citizens to meet with defendants before a trial. [208] Moreover, the Advisory Committee seems to envision that such orders could issue without the victim even being heard on the subject, a deprivation of liberty without due process of law. [209]

Even if the court had authority and had considered a victim's arguments, a face-to-face meeting with the defendant raises other problems. Such a meeting is a deposition in all but name. Yet Rule 15 provides stringent limits on the circumstances in which a defendant can depose a victim. In particular, any deposition is limited to "exceptional circumstances" and a deposition for discovery purposes is not permitted. [210] The Advisory Committee Note suggesting a meeting between a victim and a defendant does an end run around these limitations. [211]

In light of all these concerns, the best approach is simply to strike the existing requirement that a victim's address and phone number be turned over as part of an alibi defense, as I proposed. It should also be noted that this proposal raises no due process concerns that might stem from a one-sided reciprocal discovery rule. My proposal applies even handedly to both prosecution and the defense. Neither side is required to disclose the address or telephone number of a victim, thus complying with the Supreme Court's instruction that "in the absence of a strong showing of state interests to the contrary, discovery must be a two-

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[204] See infra notes 528-539 and accompanying text (discussing proposed Rule 60(a)(3)).

[205] Proposed ***Amendments***, supra note 71, R. 60, at 16.

[206] Id. at 6.

[207] *Rasul v. Bush, 542 U.S. 466, 490 (2004)* (quoting *Kokkenen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994)).*

[208] See, e.g., *State ex rel. Beach v. Norblad, 781 P.2d 349, 350 (Or. 1989)* (reversing trial court order requiring crime victim to allow defense counsel to examine her home for evidence; victim "is under no obligation to obey an order that the defendant trial judge lacked authority to issue"); *State v. Gabrielson, 464 N.W.2d 434, 438 (Iowa 1990)* (finding no constitutional, statutory, or other authority for trial court to order a psychiatric examination of a sexual abuse victim).

[209] See ***U.S. Const. amend. XIV***.

[210] 2 Charles Alan Wright, Federal Practice and Procedure (Criminal) § 241, at 11 (2000 & Supp. 2006); see, e.g., *In re United States, 878 F.2d 153, 157 (5th Cir. 1989).*

[211] Apparently in response to my arguments here, the Advisory Committee Note has been amended. See infra Afterword.

way street." [212] In any event, protecting victims from serious harm is certainly a strong state interest that would justify any incidental effect on defense preparations for trial.

Finally, however one ends up on the proper formulation of the address issue under Rule 12.1 (governing alibi defenses), the same formulation ought to be used in Rule 12.3 (governing public-authority defenses). Although I made this recommendation in a previous article, [213] the Advisory Committee appears to have overlooked this parallel provision in need of ***amendment***. So that it is not overlooked again, I will set out the proposal in full. Tracking my recommendations for Rule 12.1, I recommended a parallel ***amendment*** to Rule 12.3 as follows:
[*899]

Rule 12.3 Notice of a Public-Authority Defense

… .

(4) Disclosing Witnesses.

(A) Government's Request. An attorney for the government may request in writing that the defendant disclose the name, address, and telephone number of each witness and the address and telephone number of each witness (other than the victim) the defendant intends to rely on to establish a public-authority defense. An attorney for the government may serve the request when the government serves its response to the defendant's notice under Rule 12.3(a)(3), or later, but must serve the request no later than 20 days before trial.

(B) Defendant's Response. Within 7 days after receiving the government's request, the defendant must serve on an attorney for the government a written statement of the name, address and telephone number of each witness. and the address and telephone number of each witness (other than the victim).

(C) Government's Reply. Within 7 days after receiving the defendant's statement, an attorney for the government must serve on the defendant or the defendant's attorney a written statement of the name, address, and telephone number of each witness, and the address and telephone number of each witness (other than the victim), the government intends to rely on to oppose the defendant's public-authority defense.

(b) Continuing Duty to Disclose. Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name, address, and telephone number of any additional witness and the address and telephone number of each witness (other than the victim) if:

(1) the disclosing party learns of the witness before or during trial; and

(2) the witness should have been disclosed under Rule 12.3(a)(4) if the disclosing party had known of the witness earlier. [214]

[*900] Rule 15 - Victims' Right to Attend Pre-Trial Depositions The Proposals:

I proposed amending Rule 15 to allow victims to attend any public depositions as follows:

(i) Victims Can Attend. Victims can attend any public deposition taken under this rule under the same conditions as govern a victim's attendance at trial. [215]

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[212] *Wardius v. Oregon, 412 U.S. 470, 475 (1973).*

[213] Cassell, Proposed ***Amendments***, supra note 4, at 873.

[214] Apparently in response to my argument, the Advisory Committee has just proposed an ***amendment*** to Rule 12.3 paralleling its ***amendment*** to Rule 12.1. See infra notes 585-587 and accompanying text.

[215] Cassell, Proposed ***Amendments***, supra note 4, at 874.

The Advisory Committee did not propose any change to Rule 15. [216]

Discussion:

Rule 15 authorizes depositions for the purpose of preserving evidence for trial, [217] thus, such depositions are an extension of the trial. Victims, accordingly, have the right to attend such proceedings, if they are public, [218] under the same conditions governing their attendance at trial. To avoid any confusion over this issue, the proposed rule change directly states that fact.

The Advisory Committee declined to adopt this recommendation, concluding that depositions "do not fall within the ***CVRA***, which refers only to the victim's right not to be excluded from "public court proceedings.'" [219] But here, again, the Committee has taken too narrow a view of the ***CVRA***. It is simply unfair to victims to exclude them from a deposition in a criminal case - and, thus, a violation of the ***CVRA***'s command that victims be treated with fairness.

The simplest proof of this conclusion is to consider the rights of criminal defendants at depositions. Rule 15 directly guarantees criminal defendants a right to attend a deposition. [220] Originally the rule was silent on a defendant's presence, but in the 1975 enactment of the rule, [221] a defendant was guaranteed the right to attend. [222] Presumably, a major reason the Advisory Committee added this language **[*901]** was to ensure fairness to defendants. [223] Indeed, after an indictment, "Rule 15 depositions might constitute a "critical stage' in a prosecution - requiring the presence of counsel - because of the potential consequences of such depositions at trial." [224] Just as the Advisory Committee acted in 1975 to ensure defendants were treated fairly at criminal depositions, it should now do the same for victims.

Victims also deserve the right to attend pretrial depositions because they are now participants in the criminal justice process. As the Fifth Circuit explained in reversing a trial court which had allowed an ex parte deposition, "depositions are never ordered where one party to the suit can be present, ask the questions, and hear the answers, and the opposing party in the case is not only prevented from being present and asking questions, but is also denied even the opportunity to know what the questions and answers are." [225] The Fifth Circuit further noted that "such a procedure is not only wholly unauthorized, it is contrary to the most basic presuppositions of our adversary system of litigation." [226] Because a crime victim is now "an independent

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[216] Proposed ***Amendments***, supra note 71.

[217] See, e.g., *United States v. Edwards, 69 F.3d 419, 437 (10th Cir. 1994).*

[218] Cf. *United States v. L.M., 425 F. Supp. 2d 948, 957 (N.D. Iowa 2006)* (finding juvenile proceedings to be covered by the ***CVRA*** only insofar as they are public court proceedings).

[219] ***CVRA*** Subcommittee Memo, supra note 66, at 17 (emphasis in original) (quoting *18 U.S.C. § 3771*(a)(3)(2006)).

[220] *Fed. R. Crim. P. 15(d)(1)*-(2).

[221] The Advisory Committee recommended various changes to the rule in 1974, which Congress modified somewhat in 1975. See Wright, supra note 210, § 241, at 7-8. The changes discussed in this Article were initiated by the Advisory Committee.

[222] Wright, supra note 210, § 244, at 37.

[223] Part of the rationale may have also been to facilitate admission of the deposition testimony at trial, as a defendant has a right to confront adverse witnesses at trial. But the Confrontation Clause does not always guarantee defendants a right to attend a deposition, see, for example, *United States v. Salim, 855 F.2d 944, 955 (2d Cir. 1988),* so the defendant's right to attend the deposition must rest on a broader justification than implementing constitutional requirements.

[224] *United States v. Hayes, 231 F.3d 663, 674 (9th Cir. 2000).*

[225] *In re United States, 878 F.2d 153, 157 (5th Cir. 1989)* (emphasis in original).

[226] Id.

participant in the proceedings," [227] the same considerations demand that victims be able to attend a pretrial deposition. To be sure, crime victims (like other members of the public) will have the opportunity to hear deposition testimony when it is introduced at trial. [228] But that may be a pale substitute for actually observing a witness testify in person. [229] Victims may also be able to facilitate the truth-seeking process by watching witnesses at the deposition and alerting prosecutors or defense attorneys to any false statements that are being made. [230] Rule 15 should, therefore, be amended to ensure that crime victims have a right to attend any deposition.

Rule 17 - Victims' Right to Notice of Subpoena of Confidential Information

The Proposals:

I recommended amending Rule 17 to ensure that subpoenas to third parties seeking personal and confidential information about crime victims would not be **[*902]** abused. Initially, I proposed requiring a court determination of relevance at trial and notice to a victim as follows:

Rule 17(h)(2) - Victim Information. After indictment, no record or document containing personal or confidential information about a victim may be subpoenaed without a finding by the court that the information is relevant to trial and that compliance appears to be reasonable. If the court makes such a finding, notice shall then be given to the victim, through the attorney for the government or for the victim, before the subpoena is served. On motion made promptly by the victim, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive. [231]

The Advisory Committee proposed more limited protections for such information as follows:

Rule 17(c)(3) - Subpoena for Personal or Confidential Information About Victim. After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may not be served on a third party without a court order, which may be granted ex parte. Before entering the order, the court may require that notice be given to the victim so that the victim has an opportunity to move to quash or modify the subpoena. [232]

The Advisory Committee also proposed the following note to accompany the rule change:

Subdivision(c)(3). This ***amendment*** implements the Crime Victims' Rights Act, codified at *18 U.S.C. § 3771*(a)(8), which states that victims have a right to respect for their "dignity and privacy." The rule provides a protective mechanism when the defense subpoenas a third party to provide personal or confidential information about a victim. Third party subpoenas raise special concerns because a third party may not assert the victim's interests, and the victim may be unaware of the subpoena. Accordingly, the ***amendment*** requires judicial approval before service of a subpoena seeking personal or confidential information about a victim from a third party. The ***amendment*** also provides a mechanism for notifying the victim, and makes it clear that a victim may move to quash or modify the subpoena under Rule 17(c)(2) on the grounds that it is unreasonable or oppressive.

The ***amendment*** applies only to subpoenas served after a complaint, indictment, or information has been filed. It has no application to grand **[*903]** jury subpoenas. When the grand jury seeks the production of personal or confidential information, grand jury secrecy affords substantial protection for the victim's privacy and dignity interests.

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[227] 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[228] See *United States v. McDougal, 103 F.3d 651, 659 (8th Cir. 1996).*

[229] See generally Douglas E. Beloof & Paul G. Cassell, The Victim's Right to Attend the Trial: The Reascendant National Consensus, *9 Lewis & Clark L. Rev. 481, 534-38 (2005)* (discussing reasons victims need to hear testimony in person).

[230] See *id. at 544-45* (advancing this argument about victims attending trials).

[231] Cassell, Proposed ***Amendments***, supra note 4, at 875.

[232] Proposed ***Amendments***, supra note 71, R. 17(c)(3), at 7.

The ***amendment*** seeks to protect the interests of the victim without unfair prejudice to the defense. It permits the defense to seek judicial approval of the subpoena ex parte, because requiring the defendant to make and support the request in an adversarial setting may force premature disclosure of defense strategy to the government. The court may approve or reject the subpoena ex parte, or it may provide notice to the victim, who may then move to quash. In exercising its discretion, the court should consider the relevance of the subpoenaed material to the defense, whether giving notice would prejudice the defense, and the degree to which the subpoenaed material implicates the privacy and dignity interests of the victim. [233]

Having seen the Advisory Committee proposal and accompanying note, I am concerned that the limits on subpoenas found in the United States Supreme Court's decision in United States v. Nixon [234] might be vitiated by a broad rule. To ensure courts consistently apply Nixon's substantive and procedural standards to victim-related subpoenas, I am modifying my earlier proposal to require a court determination of specificity, relevance, and admissibility at trial, as well as notice to the victim, as follows (new language italicized):

Rule 17(c)(3) - Subpoena for Personal or Confidential Information About Victim. After a complaint, indictment, or information is filed, no record or document containing personal or confidential information about a victim may be subpoenaed without a finding by the court that the information is specifically described, relevant to and admissible at trial, and that compliance appears to be reasonable. If the court makes such a tentative finding, notice shall then be given to the victim, through the attorney for the government or for the victim, before the subpoena is served. On motion made promptly by the victim, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive and may ask the court to revisit any tentative findings. A subpoena shall not be used for discovery purposes or to obtain information for impeachment at trial.

Discussion:

The issues involved in the Rule 17 ***amendments*** are complicated and very important. It is useful to divide the discussion into three parts: (1) the problem the proposals address; (2) the procedural flaws in the Advisory Committee's proposal **[*904]** allowing ex parte subpoenas; and (3) the general lack of authority for subpoenas seeking crime victim information.

(1) The Problem of Subpoenaing Confidential Victim Information

The existing rules governing subpoenas are flawed because they allow the parties to subpoena personal or confidential information about a victim from third parties without the victim knowing. This issue was highlighted recently in the notorious Utah state criminal proceedings involving the kidnapping of Elizabeth Smart. [235] Attorneys for Elizabeth's alleged kidnapper subpoenaed class records from her high school (class and teacher lists, report cards, and disciplinary and attendance records) and medical records from her hospital. [236] The school turned over the requested records without notice to the Smart family, while the hospital refused to turn over the requested records. When Elizabeth's father learned that her school records had been turned over to defense counsel, he filed a motion to have the records returned to the school. Prosecutors in the case also objected that they were not given an opportunity to file a motion to quash prior to the production of the records. [237] The matter is apparently still under review in the state courts.

The problem that occurred in the Smart case under the Utah state rules could occur under the federal rules, as the attorney for Elizabeth Smart pointed out to the Advisory Committee in a letter. [238] The federal rules currently permit an objection from the

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[233] Id.

[234] *418 U.S. 683, 700-01 (1974).*

[235] See generally Ed Smart & Lois Smart with Laura Morton, Bringing Elizabeth Home: A Journey of Faith and Hope (2003) (discussing the Smart Case).

[236] Stephen Hunt, Defense Blasted for Obtaining Smart's School Records, Salt Lake Trib., Jan. 14, 2005, at B2.

[237] Pat Reavy, Quash Smart Subpoenas, DA Says, Deseret Morning News, Feb. 1, 2005, at B3.

[238] See Letter from Gregory G. Skordas, attorney for Elizabeth Smart, to Judge Susan Bucklew (May 23, 2005) (on file with author).

witness to whom the subpoena for documents or records is issued, [239] but there is no provision for notifying the interested party (e.g., the victim) when personal or confidential information is subpoenaed from a third party.

A recent federal case illustrates the problem under the current rules. [240] In an assault case, defense counsel used *Federal Rule of Criminal Procedure 17(c)* to obtain a subpoena for the victim's medical records held by the Veterans Administration. [241] The federal district judge approved the subpoena and issued an order, ex parte and under seal, directing the VA to provide defense counsel with **[*905]** the records. [242] Defense counsel then obtained the records, all without knowledge of the prosecutor or the victim. [243] These records included extraordinarily intimate information about the victim, including sensitive medical conditions, medications, psychiatric counseling, and the like. [244] The matter came to the prosecutor's attention - and, thus, the victim's attention - only because defense counsel "warned" the prosecutor, while attempting to negotiate a favorable plea, that taking the case to trial would cause irreparable harm to the victim because, by the time the defense attorney got finished with the victim, the victim would never trust a therapist again. [245] All this happened without any notice to the victim and without any opportunity to present arguments against disclosure of this sensitive information. [246]

Allowing such subpoenas to be delivered without notice to the victim violates the ***CVRA***'s provisions guaranteeing victims the rights to be treated "with respect for the victim's dignity and privacy" as well as "with fairness." [247] With respect to the protection for dignity and privacy, allowing subpoenas to go directly to third-party custodians of records could provide no protection if the custodian is disinclined to protect the victim's privacy. Subpoenas without notice to victims also raise fairness concerns, particularly if issues implicating the right of privacy are concerned. [248]

(2) Procedural Problems with the Advisory Committee Approach

To ensure protection of crime victims' rights when subpoenas for confidential information are issued, it is necessary to change the federal rules. I proposed an ***amendment*** to guarantee notice to crime victims as well as a court determination that the information was relevant at trial before victims' personal and confidential information could be subpoenaed. The Advisory Committee agreed that Rule 17 needed to be amended, but it proposed more limited protections for victims. The Committee would require court approval before any subpoena issues to a third party seeking information about a victim. However, the court would have discretion about whether to give the victim an opportunity to be heard on the subpoena; and there are no substantive limits on the kinds of information that defendants can subpoena.

Turning first to the procedural problems with the Advisory Committee proposal, the Committee would remit the entire issue of whether to issue a subpoena for personal or confidential information (and, indeed, whether to even tell a victim about such a subpoena) to the discretion of the court. The only protection the Advisory Committee offers is the requirement of a court order **[*906]** approving such a subpoena. The committee gives courts discretion to notify the victim or simply issue the subpoena ex parte.

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[239] *Fed. R. Crim. P. 17(c)*.

[240] See E-mail from Rod Rosenstein, U.S. Attorney for the District of Maryland, to Russell Butler, Maryland Crime Victims' Resource Center, Inc. (Jan. 3, 2007), reprinted in Testimony of Russell Butler to the Federal Criminal Rules Advisory Comm. App. A (Jan. 19, 2007), available at *http://www.uscourts.gov/rules/CR%20Comments%202006/06-CR-006.pdf*.

[241] Id.

[242] Id.

[243] Id.

[244] Id.

[245] Id.

[246] Id.

[247] *18 U.S.C. § 3771*(a)(8) (2006).

[248] See infra notes 347-351 and accompanying text.

Subpoenas issued ex parte are plainly unfair to victims. When a victim's personal or confidential information is at stake, it is truly hard to understand how anyone could argue that allowing it to be turned over to the defense without any opportunity to be heard treats victims "fairly," as the ***CVRA*** requires.

The Advisory Committee does not clearly explain when a court should proceed ex parte and when it should follow the standard practice of giving notice to the victim as the affected party. The only justification the Advisory Committee gives for the extraordinary step of allowing ex parte procedures is to avoid forcing "premature disclosure of defense strategy to the government." [249] But when a victim's confidential information is at stake, some interest in concealing "strategy" from the opposing party can hardly be sufficient grounds for ex parte issuance of a subpoena. As the Supreme Court has bluntly explained, our adversary system is not "a poker game in which players enjoy an absolute right always to conceal their cards until played." [250]

Allowing ex parte procedures violates basic principles of fairness. The American Bar Association raised this point quite effectively in its comments to the Advisory Committee on Rule 17. [251] The ABA explained that Canon 3(B)(7) of the Model Code of Judicial Conduct provides in pertinent part that "[a] judge shall accord to every person who has a legal interest in the proceedings, or that person's lawyer, the right to be heard according to law." [252] Rule 17 would allow that precept to be violated by denying some victims a chance to heard before compromising their legal rights to confidentiality in personal and confidential information. Similarly, the ABA noted that its Model Code of Judicial Conduct generally forbids courts from considering ex parte communications. [253] Rule 17, of course, flies in that face of that well-established prohibition. While the Model Code of Judicial Conduct is not binding on federal courts, its principles have generally been viewed as instructive. [254]

Defense attorneys would also be treading on ethical thin ice under proposed Rule 17. The Model Rules of Professional Conduct and the ABA Criminal Justice Standards both provide that "in representing a client, a lawyer shall not … use methods of obtaining evidence that violates the legal rights of … a [third] **[*907]** person." [255] When defense attorneys obtain ex parte subpoenas for a victim's confidential information, they may very well violate the rights of the victim, such as the right to confidentiality preserved in the doctor-patient privilege or psychotherapist privilege.

For reasons such as these, the federal rape shield rule (among other examples) properly requires defendants to always provide notice to the court - and to the victim - before seeking to introduce evidence about a rape victim's prior sexual history. [256] The rape shield rule does not create any exception for situations that might lead to disclosure of defense "strategy." Rule 17 should follow the same approach and insure that victims always have an opportunity to contest disclosure of their personal and confidential information in court.

Any defense interest in withholding strategy must give way to facially neutral rules. Both my proposed ***amendment*** and the Advisory Committee's proposed ***amendment*** apply evenhandedly to both the prosecution and the defense. Thus, the ***amendments*** are not designed to force disclosure of defense strategy, as they may also force disclosure of prosecution strategy

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[249] Proposed ***Amendments***, supra note 71, R. 17, at 8 (emphasis added).

[250] *Williams v. Florida, 399 U.S. 78, 82 (1970)* (citing William J. Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 Wash. U. L.Q. 279, 292).

[251] Letter from Robert M.A. Johnson, Chair, ABA Criminal Justice Section, to Hon. Peter G. McCabe, Sec'y of the Comm. on Rules of Practice and Procedure (Feb. 1, 2007), available at *www.uscourts.gov/rules/CR%20Comments%202006/06-CR-028.pdf*.

[252] Id. (citing Model Code of Jud. Conduct Canon 3(B)(7) (2004)).

[253] Id.

[254] See Debra Lyn Bassett, Recusal and the Supreme Court, *56 Hastings L.J. 657, 678-79 (2005)* (citing *United States v. Will, 449 U.S. 200, 211-12 & n.12 (1980); Hanrahan v. Hampton, 446 U.S. 1301, 1301 (1980)).*

[255] Model R. Prof'l Conduct 4.4(a) (2007); see also ABA Criminal Justice Study, Standard 4-4.3 (1993).

[256] See *Fed. R. Evid. 412(c)(1)(B)*.

if it is the prosecution who subpoenas confidential victim information. Due process is satisfied as long as the prosecution and the defense have reciprocal rights and courts apply the Rules consistently. [257]

The objectionable feature of the Advisory Committee proposal is that the subpoena could be issued without notice to a crime victim. A narrower issue is whether certain pleadings could be filed on this question on an ex parte basis. Such ex parte filing might be appropriate, in the sense that once the court gives notice that it is considering whether to issue a subpoena, then the defendant, the government, or, indeed, the victim might wish to file parts of their pleadings under seal for good cause shown. Requests for such sealing could be handled in the ordinary course of litigation - once the victim knew that such litigation was occurring.

Even if there is some tangential defense interest in conceding strategy, the Advisory Committee proposal addresses it in the most haphazard way. Consider the Elizabeth Smart example mentioned earlier, in which the defense sent ex parte subpoenas to Elizabeth's school and hospital. Under the Advisory Committee's proposal, a court could still decide to approve those subpoenas ex parte to prevent disclosure of some secret defense "strategy." But once the school and the hospital received the subpoenas, nothing would bar them from revealing the subpoenas' existence to the victim - and, indeed, the world. Thus, the interest the Advisory Committee purports to protect (concealing defense trial strategy) would actually be **[*908]** protected only when the third party, for whatever reason, chose not reveal the subpoena. In the Smart case, for instance, the school did not reveal the defense "strategy" [258] because it simply handed the materials over to the defense - in possible contravention of the Family Educational Rights and Privacy Act. [259] But the hospital refused to hand over Elizabeth's records and contacted the Smart family, which ultimately led to a public outcry over the subpoenas. There is no rhyme or reason to a procedure that is supposed to protect defense strategy but that actually turns on the happenstance of whether third parties choose to notify crime victims or the public about subpoenas they receive.

The haphazardness of the Advisory Committee's approach becomes even clearer when one realizes that defense "strategy" can be protected only where the confidential information happens to rest in the hands of a third party rather than the victim herself. Consider, for example, a rape victim who has talked to a rape crisis counselor, who takes notes of the meeting. A defendant might attempt to subpoena those notes from the counselor. [260] But if the counselor had previously transferred the notes back to the rape victim, then the subpoena would have to be directed to the victim herself - and the victim could then move to quash the subpoena. This is not some academic hypothetical, as rape counselors in Pennsylvania in the 1980s used precisely this procedure to protect their clients against abusive defense subpoenas. [261] Moreover, rape counselors - and, indeed, most third parties involved in maintaining the personal and confidential information of victims - will probably have very strong incentives

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[257] See *Wardius v. Oregon, 412 U.S. 470, 475-76 (1973); United States v. Bahamonde, 445 F.3d 1225, 1229 (9th Cir. 2006); Newman v. Hopkins, 192 F.3d 1132, 1135 (8th Cir. 1999),* vacated ***529 U.S. 1084 (2000); United States ex rel. Veal v. DeRobertis, 693 F.2d 642, 646-47 (7th Cir. 1982).*** Indeed, such reciprocity may not even be required if "significant governmental interests" support its omission. See *Wardius, 412 U.S. at 476.*

[258] Such as it was - apparently the only reason for the subpoenas was to try and dig up some dirt on the young kidnapping victim. See Stephen Hunt, Defense Blasted for Obtaining Smart's School Records, Salt Lake Trib., Jan. 14, 2005, at B2.

[259] *20 U.S.C. § 1232g*(b) (2006).

[260] As will be discussed shortly in the next Section of this Article, such a subpoena would likely be inappropriate for substantive reasons as well. See supra Part IV, § 3.

[261] The Pennsylvania Supreme Court initially found that records held by rape counseling centers were subject to only limited protection from defense subpoenas. See *In re Pittsburgh Action Against Rape, 428 A.2d 126, 132 (Pa. 1981).* The results of that unfortunate decision were swift. Rape victims requested the return of their records from the center and, in some cases, even requested termination of the counseling relationship. *Commonwealth v. Wilson, 602 A.2d 1290, 1294 n.6 (Pa. 1992);* Tera Jckowski Peterson, Comment, Distrust and Discovery: The Impending Debacle in Discovery of Rape Victims' Counseling Records in Utah, *2001 Utah L. Rev. 695;* Beth Stouder, Note, Pennsylvania Establishes New Privilege for Communications Made to a Rape Crisis Center Counselor - In re Pittsburgh Action Against Rape, 55 Temp. L.Q. 1124, 1146 (1982). In light of this serious problem, the Pennsylvania legislature enacted a new, absolute privilege protecting communications to rape crisis counselors from any disclosure without the consent of the victim. See 42 Pa. Cons. Stat. § 5945.1(b) (2000) (upheld against constitutional attack in *Wilson, 602 A.2d at 1297).*

for disclosing the fact of the subpoena to the victim, because of both ethical and legal considerations. [262] Thus, the Advisory **[*909]** Committee's use of ex parte procedures will only randomly protect defense strategy from disclosure.

The impossibility of truly ex parte procedures for Rule 17 subpoenas to third-parties has been recognized by several court decisions. For example, in United States v. Urlacher, the defendant sought to use Rule 17 to subpoena financial, family, and employment information concerning an individual believed by the defendant to be the government's main witness at trial. [263] The court declined to approve the subpoena ex parte, explaining that the custodian of the records "has a Rule 17(c) motion to quash or modify, and one cannot easily imagine that such a motion should be heard and decided in secret … and hidden from the opposing party and the public." [264] The court went on to explain the constitutional difficulties presented by such an approach, given that the First ***Amendment*** creates a general public right of access to court proceedings. [265]

Even if there is some arguable defense interest in not disclosing "strategy," that interest must be subordinated to the compelling victim interests that are at stake. My proposal (and the Advisory Committee's) applies to third-party subpoenas directed to the victim's personal or confidential information. Congress has commanded that victims must not only be treated with "fairness," but also "with respect for the victim's dignity and privacy." [266] Protecting dignity and privacy requires a hearing when confidential information is at stake.

The Advisory Committee Note on its proposal does obliquely deal with this issue in a way that misstates the relevant legal landscape. The Note accompanying the proposed Rule 17 ***amendment*** states vaguely that, "in exercising its discretion [about whether to give notice of a request for a subpoena], the court should consider the relevance of the subpoenaed material to the defense, whether giving notice would prejudice the defense, and the degree to which the subpoenaed material implicates the privacy and dignity interests of the victim." [267] This imprecise listing of discretionary factors misstates the law. The court is not required to "consider" some victim-related factors and then make a discretionary decision. The ***CVRA*** commands that victims have "the right" to "be treated … with respect for the victim's dignity and privacy." [268] Thus, if withholding notice to a victim fails to respect the victim's dignity and privacy (as I believe it invariably will), then the court must give notice - end of story. [269] The ***CVRA*** flatly directs: **[*910]** "In any court proceedings involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described [in the ***CVRA***]." [270]

The Advisory Committee Note is also an incomplete listing of the victim's rights that are implicated in decisions about issuing subpoenas. From a procedural perspective, if the court holds a hearing on whether to issue the subpoena, the ***CVRA*** entitles a

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[262] Cf. *42 U.S.C. § 254b*(k)(3)(B) (2006) (enforcing confidentiality of medical records).

[263] *136 F.R.D. 55, 551-57 (W.D.N.Y. 1991).*

[264] Id. at 556.

[265] Id. at 556-57. But cf. ***United States v. Beckford, 994 F. Supp. 1010, 1027 (E.D. Va. 1997)*** (noting that Urlacher states the majority rule, but concluding that ex parte procedures should be permitted in "exceptional circumstances").

[266] *18 U.S.C. § 3771*(a)(8).

[267] See Proposed ***Amendments***, supra note 71, R. 17, at 8.

[268] *18 U.S.C. § 3771*(a)(8).

[269] In theory, the Advisory Committee could argue that the ***CVRA*** is unconstitutional in this respect and therefore must give way. But the ***CVRA*** is presumed to be constitutional and the caselaw strongly supports the Act. See, e.g., *Wardius v. Oregon, 412 U.S. 470, 475 (1973)* (finding no constitutional barrier to reciprocal discovery rules that act as a "two-way street"); cf. *Forsythe v. Walters, 38 F. App'x 734, 737 (3d Cir. 2002)* (finding that "application of the ***CVRA*** does not exact a punishment and therefore the ***CVRA*** can not violate the Ex Post Facto Clause").

[270] *18 U.S.C. § 3771*(b)(1) (emphasis added).

crime victim to notice of that proceeding [271] and to an opportunity to attend that hearing, unless the victim's testimony would clearly be materially affected from attending the hearing. [272] From a substantive perspective, subpoenas for personal or confidential materials are often outside the scope of legitimate discovery, as will be explained in the next section. Such subpoenas can also implicate a victim's right to "be reasonably protected from the accused." [273] For example, a defense subpoena to the Department of Motor Vehicles for address information could very directly jeopardize a victim's safety. [274] Yet the Advisory Committee Note makes no mention of such legitimate factors - factors the ***CVRA*** requires courts to consider.

Finally, given all this, if disclosure of defense "strategy" somehow remains the overriding issue in handling a subpoena, there are less-abusive means for dealing with the problem. For example, a court could give the victim notice of the subpoena but also enter an order forbidding the prosecution from using any information it might learn as a result of this disclosure. Such an order is far preferable to the ex parte procedure proposed by the Advisory Committee. For the above reasons, the Advisory Committee's proposal for Rule 17 is insufficiently protective of crime victims' procedural rights. [275]

(3) The Lack of a Basis for Defense Subpoenas for Confidential Information

The Advisory Committee's approach is not only procedurally flawed but also substantively flawed. In particular, the Advisory Committee arguably expands a defendant's power to subpoena confidential material from a victim, thereby creating new rights for defendants at the expense of victims' rights under the **[*911]** ***CVRA***. This violates the Rules Enabling Act, which provides that court-promulgated rules shall not "abridge, enlarge or modify any substantive right." [276]

The Advisory Committee's proposed rule would read: "[A] subpoena requiring the production of personal or confidential information about a victim may not be served on a third party without a court order, which may be granted ex parte." [277] The clear implication of this sentence is that, with a court order, a subpoena can be served on a third party requiring production of personal or confidential information. Nothing in the proposed rules (or the Advisory Committee Notes) appears to require any further showing before the subpoena would issue. This seems to give defendants unrestrained subpoena power over confidential information. If this implication is correct, then the Advisory Committee has, remarkably, taken a law designed to provide more protection for victims and used it to create less in clear contravention of the ***CVRA*** and the Rules Enabling Act.

The governing law on subpoenas comes from United States v. Nixon, which interpreted Rule 17 to require a subpoenaing party to show relevancy, admissibility, and specificity of any information sought. [278] In particular, for a subpoena to issue before trial, Nixon requires the moving party to show:

(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance

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[271] Id. § 3771(a)(2).

[272] Id. § 3771(a)(3).

[273] Id. § 3771(a)(1).

[274] In addition, the ability to subpoena such information would directly undermine current caselaw, which grants the defendant no right to disclosure of the names and addresses of government witnesses before trial. For further discussion, see infra notes 325-335 and accompanying text.

[275] Apparently as a partial response to these concerns, the Advisory Committee made some changes in its proposed ***amendment*** to Rule 17. See infra notes 232-233 and accompanying text.

[276] *28 U.S.C. § 2072*(b).

[277] Proposed ***Amendments***, supra note 71, R. 17(c)(3), at 7.

[278] *418 U.S. 683, 700 (1974).*

of trial and that failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition." [279]

Because of this governing law, I proposed that Rule 17 should itself identify restrictions on a defendant's ability to subpoena confidential information. My proposal incorporates specificity, relevancy, and admissibility components - conforming with, rather than altering, existing law. My current proposal [280] requires the information be specifically described and admissible at trial - and it bars evidence sought for impeachment purposes only. In contrast, the Advisory Committee seemingly enlarges the substantive rights of defendants by failing to reference even a single Nixon factor in its proposal. Thus, unless a court takes it upon itself to ensure the relevancy, specificity, and admissibility of the subpoenas, **[*912]** the Advisory Committee proposal might provide the defendant with license to conduct the very "fishing expedition" that Nixon forbids.

The proposed Advisory Committee Note adds to this confusion. The Note indicates that in considering whether to issue the subpoena, the court should consider "the relevance of the subpoenaed material to the defense." [281] But this is an overly broad formulation. The court should only consider the relevance of the material to the defense at trial, since this is the only permissible basis for a subpoena.

Current law clearly limits Rule 17 subpoenas to evidence that is admissible at trial. [282] The reason for Nixon's limitations of relevance, admissibility, and specificity is that subpoenas are "not intended to provide a means of discovery for criminal cases" but only to "expedite the trial by providing a time and place before trial for the inspection of subpoenaed materials." [283] With regard to admissibility, Nixon explained that "generally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial." [284] In other words, documents sought for the narrow purpose of impeachment are not evidentiary for the purposes of Rule 17. [285] In Nixon, only because the prosecutor made a sufficient preliminary showing that the subpoenaed tapes contained "evidence admissible with respect to the offenses charged in the indictment" and that the evidence could be validly used as nonimpeachment evidence, did the Court find the evidence to be subpoenable. [286]

Courts apply Nixon's admissibility test strictly, rejecting, for example, subpoenas for hearsay evidence that would be inadmissible at trial. [287] The cases have recognized that broad subpoenas run afoul of these limitations - including subpoenas seeking information about crime victims. [288] For example, in United States v. Hang, the Eighth Circuit affirmed the district

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[279] *Id. at 699-700* (citing *United States v. Iozia, 13 F.R.D. 335, 338 (S.D.N.Y. 1952)).*

[280] My earlier proposal specifically required that no subpoena would issue "without a finding by the court that the information is relevant to trial." Cassell, Proposed ***Amendments***, supra note 4, at 875 (emphasis added). In view of the importance of the Nixon factors, it now seems desirable to spell them all out, as my current proposal does.

[281] Proposed ***Amendments***, supra note 71, R. 17, at 8.

[282] *Nixon, 418 U.S. at 699-700.*

[283] *Id. at 698-99* (emphasis removed).

[284] *Id. at 701.*

[285] See *United States v. Cherry, 876 F. Supp. 547, 553 (S.D.N.Y. 1995).*

[286] *Nixon, 418 U.S. at 700-702.*

[287] See, e.g., *Cherry, 876 F. Supp. at 553* (rejecting subpoenaed prosecutors' investigative files as inadmissible hearsay).

[288] Cf. *United States v. Alexander, No. 94-10568, 1996 U.S. App. LEXIS 1662, 16-17* (9th Cir. Jan. 18, 1996) (quashing subpoenaed records from rape center because nothing warranted disclosure prohibited by Victims of Crimes Act); *United States v. Cherry, No. 90-5784, 1991 U.S. App. LEXIS 18192, 11-13* (4th Cir. Aug. 12, 1991) (quashing subpoenaed police files because they were in part irrelevant); *Amsler v. United States, 381 F.2d 37, 51 (9th Cir. 1967)* (holding subpoena of Frank Sinatra, regarding ransom money, an oppressive and unreasonable use of the court).

court's refusal to issue subpoenas designed to uncover documents relating to the mental health of a victim and various witnesses. [289] The court described the broad and speculative nature of the request directed toward a hospital, observing that the defense was ""hard- **[*913]** pressed' to describe the information it hoped to discover in the materials." [290] Consistent with Nixon, the court found the defendant's request "exemplified his "mere hope' that the desired documents would produce favorable evidence, and a Rule 17(c) subpoena cannot properly be issued upon a "mere hope.'" [291] Similarly, in State v. Percy, the Vermont Supreme Court upheld the lower court's refusal to order production by the victim. [292] The defendant had requested production of the victim's mental health information, arguing it was necessary for him to present his defense. [293] The Vermont Supreme Court rejected the defendant's arguments, finding that he made no showing of the materiality or helpfulness of the information - "indeed, [the] defendant essentially admitted the underlying acts." [294] The court also found it notable that the information sought was in the hands of a third party - not the State - and that the defendant made a broad request, rather than specifying particular records in the subpoena. [295] In aggregate, the court considered those factors "fatal" to the defendant's request. [296]

These cases were all decided against a constitutional backdrop that must favor crime victims: a criminal defendant has no constitutional right to conduct discovery, while confidential and personal information of crime victims may be protected by a constitutional right of privacy.

The Supreme Court has clearly held that "there is no general constitutional right to discovery in a criminal case." [297] Indeed, the Constitution "has little to say regarding the amount of discovery which the parties must be afforded." [298] The only remotely related due process requirement the Court has recognized is the requirement that prosecutors disclose evidence that is favorable to the accused and material to guilt or punishment [299] - evidence that would deprive the defendant of a fair trial if not disclosed. [300] But even this rule - the Brady rule - is not a discovery rule and it does not reflect any discovery rights. Rather, it is a "self-executing constitutional rule" - a rule of "fairness and minimum prosecutorial obligation." [301] Recognizing this, the Supreme Court has carefully circumscribed Brady: "An interpretation of Brady to create a broad, constitutionally required right of discovery would entirely alter the character and balance of our present systems of **[*914]** criminal justice." [302] Indeed,

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[289] *75 F.3d 1275, 1283-84 (8th Cir. 1996).*

[290] *Id. at 1283.*

[291] Id. (citing *United States v. Cuthbertson, 630 F.2d 139, 146 (3d Cir. 1980)).*

[292] ***548 A.2d 408, 415 (Vt. 1988).***

[293] ***Id. at 413.***

[294] ***Id. at 414-15.***

[295] Id.

[296] ***Id. at 415.***

[297] *Weatherford v. Bursey, 429 U.S. 545, 559 (1977);* see also *United States v. Ruiz, 536 U.S. 622, 629 (2002)* (quoting *Weatherford, 429 U.S. at 559).*

[298] *Wardius v. Oregon, 412 U.S. 470, 474 (1973).*

[299] See *Brady v. Maryland, 373 U.S. 83, 87 (1963).*

[300] See *United States v. Bagley, 473 U.S. 667, 675 (1985).*

[301] *United States v. Garrett, 238 F.3d 293, 302 (5th Cir. 2000)* (citation and internal quotation marks omitted).

[302] *Bagley, 473 U.S. at 675 n.7* (citation and internal quotation marks omitted).

Brady's requirements are incongruous with traditional discovery, as Brady does not even apply at pretrial stages. [303] *Rule 16 of the Federal Rules of Criminal Procedure* was built on this foundation. The assumption that no right to discovery exists "is still the underlying predicate for Rule 16." [304]

Because there is no constitutional right to discovery, discovery is determined largely by statute and court rule. [305] Discovery statutes typically apply to exculpatory material within the possession or control of the state. [306] For example, in the Supreme Court case of Pennsylvania v. Ritchie, the defendant sought recorded statements made to a youth counselor concerning an alleged assault. [307] The recorded statements were taken and possessed by Pennsylvania's Children and Youth Services, a state-created agency. [308] The Court concluded that due process considerations required an in camera review of the records to see whether they might contain information material to the defense. [309] The Court explained that "it is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." [310] The Court cited the well-known decision of Brady v. Maryland, [311] as authority for this conclusion. [312]

Ritchie and other cases relying on Brady have no relevance to the issue of subpoenas to third parties. "Brady imposes a constitutional duty on prosecutors to turn over exculpatory evidence … ." [313] The rationale for such a rule is that the prosecutor, after initiating criminal charges, should not be the "architect" of an unfair proceeding. [314] Plainly, crime victims (and third parties holding records about crime victims) are not state actors. They are not architects of the criminal proceedings and therefore are not subject to these constitutional restrictions on state action. The Seventh Circuit explained this point clearly in United States v. **[*915]** Hach. [315] There, the defendant sought to compel a third-party witness to turn over her medical and psychiatric records to the court for in camera review. [316] The witness refused to release her records, which were not held by any government agency. [317] The government argued it was powerless to force her to accede to the demand. [318] The Seventh Circuit agreed, holding that "a failure to show that the records a defendant seeks are in the government's possession is fatal to [a Ritchie claim]." [319] The Seventh Circuit noted that the two other opinions it could locate on the due process question had reached precisely the same conclusion. [320] In United States v. Skorniak, the Eighth Circuit held that a defendant could not subpoena medical records of a witness. [321] And the government is under no obligation to seek out potentially exculpatory

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[303] See ***United States v. Frick, 490 F.2d 666, 671 (5th Cir. 1978)*** (citing *Archer v. United States, 393 F.2d 124, 126 (5th Cir. 1968)).*

[304] *United States v. Oxman, 740 F.2d 1298, 1307 (3d Cir. 1984).*

[305] See 4 Wayne R. LaFave et al., Criminal Procedure § 20.3m, at 930-31 (3d ed. 2000).

[306] See, e.g., *Fed. R. Crim. P. 16(a)* (requiring "the government" to disclose to the defense various kinds of information).

[307] *480 U.S. 39, 43 (1987).*

[308] See id.

[309] *Id. at 47.*

[310] *Id. at 57* (emphases added).

[311] *373 U.S. 83 (1963)* (holding government must disclose exculpatory evidence in its possession to the defense).

[312] *Richie, 480 U.S. at 57.*

[313] *Bolduc v. United States, 402 F.3d 50, 56 n.6 (1st Cir. 2005)* (emphasis added). Courts have held that Brady obligations extend only to prosecutors, because the Supreme Court has not imposed this duty on others. See *Villasana v. Wilhoit, 368 F.3d 976, 979 (8th Cir. 2004).*

[314] See *Brady, 373 U.S. at 88.*

[315] *162 F.3d 937 (7th Cir. 1998).*

evidence, the court reasoned. [322] Similarly, a Maryland appellate court, in Goldsmith v. State, denied a defendant's attempt to obtain access to a witness's psychiatric record. [323] After examining the relevant authorities, the court explained: "We find no common law, court rule, statutory or constitutional requirement that a defendant be permitted pretrial discovery of privileged records held by a third party." [324] Thus, crime victims (and third parties holding information about crime victims) will only rarely - if ever - have information a defendant is constitutionally entitled to examine.

Because a defendant has no constitutional right to discovery, any such claim must rest on a statute. Yet the federal statutes, if anything, cut against broad discovery claims. The Jencks Act, [325] for example, restricts access to statements by **[*916]** government witnesses. [326] It specifically mandates that only after a government witness testifies on direct examination shall the statement of the witness be the subject of discovery. [327] The Jencks Act does not even allow access to all statements - a witness statement need only be produced if the statement "relates to the subject matter "as to which the witness has testified'" not if it merely "relates to the subject matter "at issue in [the] case.'" [328] Even then, only a ""substantially verbatim recital of an oral statement made by said witness to an agent'" is discoverable under the Jencks Act. [329] Although the Act was meant to preserve defendants' right to access information that might aid in impeaching government witnesses at trial, "the legislative history expresses a much greater concern with limiting the application of the Jencks decision so that it would not hamper the workings of law enforcement by forcing wholesale disclosure of government materials and files." [330]

The Jencks Act also bars any pretrial disclosure of witness statements. "Congress provided for discovery of statements only after the witness has testified, out of concern for witness intimidation, subornation of perjury, and other threats to the integrity of the trial process." [331] Courts have held true to this congressional determination, blocking defense efforts to obtain pretrial discovery about government witnesses. For example, in United States v. Coppa, the Second Circuit overturned the district court's approval of a scheduling order requiring the government to identify its witnesses in advance of trial. [332] The district court, "mindful of [the Act's] concern" for witness safety, had allowed the government to file ex parte motions delaying discovery of the witnesses' identity where such disclosure would pose a threat to the witnesses' lives or safety. [333] The Second Circuit, however, found this protection insufficient to meet the witness-protective goals of the Jencks Act. Specifically, the

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[316] *Id. at 946.*

[317] Id.

[318] Id.

[319] *Id. at 947.* The Seventh Circuit also noted that the Wisconsin Supreme Court had reached a contrary conclusion, relying on state law grounds. *Id. at 946 n.5.* The Wisconsin decisions do not offer a principled reason for extending Ritchie to private records and should not be regarded as persuasive authority here. See *State v. Shiffra, 499 N.W.2d 719, 722 (Wis. Ct. App. 1993)* (concluding that the issue of application of Ritchie to private records had already been decided in State v. S.H.); *State v. S.H., 465 N.W.2d 238, 241 (Wis. Ct. App. 1999)* (applying Ritchie to private records without any discussion of the issue).

[320] *Hach, 162 F.3d at 947.* Other courts have reached the same result. See, e.g., *United States v. Hall, 171 F.3d 1133, 1145 (8th Cir. 1999)* (upholding decision not to compel disclosure of witness medical and psychiatric records: "the government has no obligation to obtain for a defendant records that it does not already have in its possession or control"); *State ex rel. Romley v. Superior Court, 836 P.2d 445, 452 (Ariz. Ct. App. 1992)* ("Brady emphasizes suppression of evidence by the prosecution, but does not require the victim to cooperate with the defense [to produce medical records held by the victim].").

[321] *59 F.3d 750, 755-56 (8th Cir. 1995).*

[322] Id.

[323] *651 A.2d 866, 868, 877 (Md. 1995).*

[324] *Id. at 873.*

[325] *18 U.S.C. § 3500* (2006).

[326] Id. § 3500(a).

court determined "this remedy does not address the Government's justifiable concerns regarding the risk of witness tampering in circumstances where there is no evidence that the life or safety of a prospective witness is in danger." [334] In other words, Jencks Act protection is not limited to situations where the government shows an actual danger to witnesses - its witness-protective qualities reach much further. [335]

[*917] The lack of grounds for subpoenas seeking victim information is more evident when viewed against a legal landscape that gives defendants no right before trial to obtain even the names of government witnesses. Current law provides no basis for the pretrial disclosure of the names and addresses of government witnesses - including witnesses who are crime victims. For one thing, Rule 16, which governs discovery and inspection in criminal cases, contains no provisions for such disclosure. This omission was purposeful and mirrors the witness-protective purposes of the Jencks Act:

A majority of the Conferees [that is, congressional members determining the language of Rule 16] believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contacts directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy. [336]

Rule 16, therefore, along with other criminal discovery rules, "does not entitle defendants to pretrial discovery of names and addresses of prospective government witnesses or persons who have knowledge of the case." [337]

By statute, capital cases are exempt from this rule. In capital cases, the accused is entitled to a copy of the indictment and a list of juror and witness names and address - but only three days in advance of the trial. [338] And notably, the same statute explicitly provides for the withholding of this information "if the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person." [339] No statute authorizes similar disclosures in noncapital cases. As the Eighth Circuit noted in United States v. Hutchings, "neither [Rule 16(a)] governing information subject to disclosure by the Government in criminal cases, nor any other federal rule or statute requires the Government to supply names of potential

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[327] See id. § 3500(b); see also *Fed. R. Crim. P. 26.2* (integrating Jencks Act into the federal rules).

[328] *United States v. Susskind, 4 F.3d 1400, 1404 (6th Cir. 1993).*

[329] *United States v. Martinez, 87 F.3d 731, 739 (5th Cir. 1996)* (quoting *Palermo v. United States, 360 U.S. 343, 351 (1959)).*

[330] *United States v. Bobadilla-Lopez, 954 F.2d 519, 521 (9th Cir. 1992).*

[331] *United States v. Tarantino, 846 F.2d 1384, 1414 (D.C. Cir. 1988).*

[332] *267 F.3d 132, 138, 145-46 (2d Cir. 2001).*

[333] *Id. at 138-39.*

[334] *Id. at 139.*

[335] See, e.g., *United States v. Presser, 844 F.2d 1275, 1285 (6th Cir. 1988)* ("Providing the defense with such a broad right of pre-trial discovery would vitiate an important function of the Jencks Act, the protection of potential government witnesses from threats of harm or other intimidation before the witnesses testify at trial.").

[336] H.R. Rep. No. 94-414, at 12 (1975) (Conf. Rep.), reprinted in 1975 U.S.C.C.A.N. 713, 716.

[337] *United States v. Laurins, 660 F. Supp. 1579, 1584 (N.D. Cal. 1987).*

[338] See *18 U.S.C. § 3432* (2006).

[339] See id.

witnesses to a criminal defendant in a noncapital case." [340] Many other courts have reached substantially the same conclusion. [341]

[*918] A few older cases held that district courts possess authority to compel the government to disclose the identity of its witnesses before trial. However, the basis for such grants of authority now seems defunct. For instance, in United States v. Armstrong, the Ninth Circuit recognized no authority exists in the federal rules for requiring the government to disclose the names of its witnesses. [342] Still, the court held that district courts have authority to require such disclosure based on *Federal Rule of Criminal Procedure 57(b)*. [343] This rule acts as a stopgap: in the absence of controlling law, it allows judges to "regulate practice in any manner consistent with federal law, these rules, and the local rules of the district." [344] In light of the conference report on Rule 16, compelling disclosure of witness names before trial appears inconsistent with the federal rules. And even if the Ninth Circuit's approach was valid at the time Armstrong was decided, such an approach is no longer valid in light of the ***CVRA***. Rule 57(b) only provides a basis for court authority in the absence of controlling law - since 2004, the ***CVRA*** has controlled the treatment of victims. The ***CVRA*** clearly mandates a victim be "reasonably protected from the accused," [345] as well as treated with "fairness and with respect for the victim's dignity and privacy." [346] Disclosure of a victim's name and address before trial is governed by these mandates, not vague gap-filling provisions.

If a defendant cannot even validly compel disclosure of a victim's name and address in advance of trial, it is nonsensical to think a defendant could validly subpoena the same information from the Department of Motor Vehicles or the telephone company - and it is incredible to think a defendant could use the Advisory Committee's rule to subpoena even more personal victim information. The rules would be backward indeed if a defendant were able to subpoena a victim's confidential mental health records in a legal system that disallows compelled disclosure of a witness's name or address. Instead, the only rational conclusion is that because defendants have no right to witnesses' identifying information, they certainly have no right to other sorts of victim-related discovery. Clearly, then, defendants have little constitutional or statutory "heft" behind an argument for subpoenas directed at obtaining victim information.

On the other hand, victims will often have legitimate reasons for resisting such subpoenas - reasons that are protected not only by the ***CVRA*** but also by the Constitution, under current case law, and as part of the right of privacy. [347] One aspect of this due process privacy right is "the individual interest in avoiding **[*919]** disclosure of personal matters" [348] or, in other words, "the

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[340] *751 F.2d 230, 236 (8th Cir. 1984);* accord *United States v. House, 939 F.2d 659, 663 (8th Cir. 1991)* ("Criminal defendants in non-capital cases are not entitled to pretrial disclosure of witnesses.").

[341] See, e.g., *United States v. Pearson, 340 F.3d 459, 468 (7th Cir. 2003); United States v. Bejasa, 904 F.2d 137, 139 (2d Cir. 1990); United States v. Barrett, 766 F.2d 609, 617 (1st Cir. 1985); United States v. Conder, 423 F.2d 904, 910 (6th Cir. 1970).*

[342] *631 F.2d 951, 954-55 (9th Cir. 1980).*

[343] *Id. at 955.*

[344] *Fed. R. Crim. P. 57(b)*.

[345] *18 U.S.C. § 3771*(a)(1) (2006).

[346] Id. § 3771(a)(8).

[347] My discussion of these issues draws heavily on thoughts from an extremely knowledgeable crime victims' litigator - Wendy Murphy. See Wendy J. Murphy, Crime Victims, Not Defendants, Enjoy Constitutional Rights When the Accused Seeks Access to Private Third-Party Records (2007) [hereinafter Murphy, Crime Victims]; see also Wendy J. Murphy, "Federalizing" Victims' Rights to Hold State Courts Accountable, *9 Lewis & Clark L. Rev. 647 (2005).*

[348] *Whalen v. Roe, 429 U.S. 589, 598-99 (1977).* In his Whalen concurrence, Justice Brennan asserted that if a statute allowed indiscriminate disclosure of personal medical records, "such a deprivation [of privacy] would only be consistent with the Constitution if it were necessary to promote a compelling state interest." *Id. at 607* (Brennan, J., concurring).

privacy interest in keeping personal facts away from the public eye." [349] Consider, for example, the privacy of therapeutic counseling communications. Federal case law establishes that such communications are protected by a constitutional privacy right [350] - a right that would be gutted if defendants were allowed to freely subpoena victims' mental health records. Moreover, some courts and commentators suggested the Fourth ***Amendment***'s prohibition against unreasonable searches and seizures applies to (and may prohibit) court-mandated discovery of victims. [351]

For all these reasons, a defense subpoena seeking third-party information about a crime victim rests on extraordinarily shaky ground. The Advisory Committee must ensure that through casual drafting it does not inadvertently invite more defense subpoenas for such information. The Advisory Committee's current draft may well have that effect, by seemingly authorizing such subpoenas without regard to the numerous restrictions governing their use (and even allowing them to be issued ex parte). The Committee should, instead, follow my approach by indicating very clearly that such subpoenas are only allowed where specifically identified evidence will be obtained that is relevant to and admissible at trial, and **[*920]** that is otherwise reasonable. As a weaker but still positive alternative, the Committee could include an Advisory Committee Note making this point clear. One possible note would be as follows:

Rule 17(c)(3) is intended to provide greater procedural protection for crime victims than exists under current law. It is not intended to expand in any way the permissible grounds for defense subpoenas. Like other trial subpoenas, a defense subpoena seeking victim information must narrowly request only information admissible at trial and may not be used for discovery. See *United States v. Nixon, 418 U.S. 683*[, 700] (1974) (requiring subpoenaing party to "clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity"). A defense subpoena must also not tread on a crime victim's constitutionally-protected privacy interests, see *Whalen v. Roe, 429 U.S. 589, 598-99 (1977),* or statutorily-protected interests to respect for privacy and dignity, see Crime Victims' Rights Act, *18 U.S.C. § 3771*(a) (2000 & Supp. 2006). As a result, such subpoenas will only rarely be proper. See generally Paul G. Cassell, Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure, *2007 Utah L. Rev. 861.* [352]

Rule 18 - Victims' Interests in Setting the Place of Prosecution The Proposals:

I proposed amending Rule 18 to require the court to consider the convenience of victims in setting the place of prosecution as follows:

Rule 18. Place of Prosecution and Trial

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[349] *U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 769 (1989).*

[350] See *Borucki v. Ryan, 827 F.2d 836, 845 (1st Cir. 1987)* (recognizing right to privacy issues that arise with regard to communications to mental health workers); *Caesar v. Mountanos, 542 F.2d 1064, 1072 (9th Cir. 1976)* (finding psychotherapist-patient communications fall within right to privacy); *Haw. Psychiatric Soc'y v. Ariyoshi, 481 F. Supp. 1028, 1038 (D. Haw. 1979)* (finding zone of autonomy protects decision to communicate personal information to psychiatrist); see also *Nat'l Transp. Safety Bd. v. Hollywood Mem'l Hosp., 735 F. Supp. 423, 424 n.2 (S.D. Fla. 1990)* (citation and internal quotations omitted).

[351] See, e.g., *People v. Nokes, 183 Cal. App. 3d 468, 476-78 (Cal. Ct. App. 1986)* (reviewing Fourth ***Amendment*** precedent in its determination of the validity of court-ordered examinations of victims and determining precedent to be contrary to allowing such examinations); see also Murphy, Crime Victims, supra note 347 ("The Fourth ***Amendment*** is not only a right of criminal defendants, but a "right of the people' to be free from unreasonable searches of their "persons, houses, papers and effects' … . Therefore, the Fourth ***Amendment*** protections extended to criminal defendants in Boyd must also be extended to the third parties impacted by criminal litigation."); Troy Andrew Eid, Comment, A Fourth ***Amendment*** Approach to Compulsory Physical Examinations of Sex Offense Victims, *57 U. Chi. L. Rev. 873, 894 (1990)* (arguing that court-mandated physical examinations of victims' of sexual crimes are prohibited by the Fourth ***Amendment***, as interpreted by the Supreme Court). But cf. *Borucki v. Ryan, 827 F.2d 836, 844 (1st Cir. 1987)* (finding information the Fourth ***Amendment*** protects from seizure is not "necessarily entitled to protection under a right of nondisclosure originating in the Fourteenth ***Amendment***").

[352] In response to my criticisms, the Advisory Committee agreed to make some changes in its proposed rule, making it much more difficult (but not impossible) for defendants to obtain an ex parte subpoena. See infra notes 588-592 and accompanying text.

Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice. [353]

The Advisory Committee adopted this proposal verbatim. [354]

[*921] Discussion:

Little needs be said about the Advisory Committee's agreement with my proposal here, other than to note that the Committee's rationale for this change was "to implement the victim's "right to be treated with fairness' under the Crime Victims' Rights Act." [355] Why the Advisory Committee chose to implement the victims' fairness rights in Rule 18 - and only Rule 18 - is not immediately clear. [356]

Rule 20 - Victims' Views Considered Regarding Consensual Transfer The Proposals:

I proposed that Rule 20 be amended to allow the court to consider the victim's views in any decision to transfer a case as follows:

Rule 20. Transfer for Plea and Sentence

(a) Consent to Transfer. A prosecution may be transferred from the district where the indictment or information is pending, or from which a warrant on a complaint has been issued, to the district where the defendant is arrested, held, or present if:

(1) the defendant states in writing a wish to plead guilty or nolo contendere and to waive trial in the district where the indictment, information, or complaint is pending, consents in writing to the court's disposing of the case in the transferee district, and files the statement in the transferee district; and

(2) the United States attorneys in both districts approve the transfer in writing after consultation with any victim. If any victim objects to the transfer, the United States attorney in the transferring district or the victim's attorney shall advise the court where the indictment or information is pending of the victim's concerns. [357]

I also proposed a similar change should be made to Rule 20(d) regarding transfer of juvenile proceedings. [358]

The Advisory Committee recommended no change to Rule 20. [359]

[*922] Discussion:

The Advisory Committee rejected this proposed change for the following reasons:

The ***CVRA*** does not specifically address transfer. It does give the victim a right to confer with the attorney for the government, *18 U.S.C. § 3771*(a)(5), but that is not the same as requiring the attorney for the government to notify the court of the victim's views regarding transfers. Indeed, the ***CVRA*** provides that "nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." *18 U.S.C. § 3771*(d)(6). Accordingly, the

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[353] Cassell, Proposed ***Amendments***, supra note 4, at 878-79.

[354] See Proposed ***Amendments***, supra note 71, R. 18, at 9.

[355] Id. at 352.

[356] See supra notes 95-97 and accompanying text (discussing this point).

[357] Cassell, Proposed ***Amendments***, supra note 4, at 879-80.

[358] Id. at 879-80.

[359] Proposed ***Amendments***, supra note 71.

CVRA contemplates that the attorney for the government will consider the victim's interests in exercising prosecutorial discretion, including the discretionary determination whether to consent to a Rule 20 transfer. The Subcommittee was not persuaded that the rule should disturb this statutory balance by requiring the attorney for the government to advise the court of a victim's objection to a Rule 20 transfer. In appropriate cases, the attorney for the government should appraise the court of the victim's view. [360]

The Advisory Committee is able to claim that the ***CVRA*** does "not specifically address transfer" only because it reviewed an amputated ***CVRA*** - that is, a ***CVRA*** without a right to fairness. Under an unblinkered fair reading of the ***CVRA***, the right to fairness applies "specifically" to Rule 20 transfer decisions, no less than the Rule 18 decision to set the place of prosecution just discussed and, indeed, all other decisions in the criminal justice process. Thus, the Advisory Committee has unfairly stacked the deck in deciding that it would not "disturb this statutory balance," when it chose not to weigh the victim's right to fairness as part of that balance.

Even under its truncated view of the statute, the Advisory Committee does envision that the prosecutors will confer with victims about Rule 20 transfer decisions. But the Committee did not want to require prosecutors to notify courts of a victim's objection, venturing only that "in appropriate cases, the attorney for the government should appraise the court of the victim's views." [361] The Committee is coy on the question of when it would not be appropriate for the prosecutor to fail to notify a court of the victim's views. Whenever an unrepresented crime victim objects to transferring a case, prosecutors, as officers of the court, have a duty to pass that objection along to the court as relevant **[*923]** information bearing on the transfer decision. [362] The rule should state that fact directly.

Finally, nothing in my proposal would impair prosecutorial discretion. My proposal deals solely with ensuring that victim information is passed along to the judge who must approve a transfer decision. The government remains entirely free to make whatever decision it wants on the issue and argue whatever position it believes is appropriate. Moreover, the ***CVRA*** itself envisions that the government may have obligations to assert victims' rights. For starters, the ***CVRA*** requires prosecutors to "make their best efforts" to see that victims are "accorded" their rights. [363] In addition, the ***CVRA*** gives prosecutors the ability to "assert" victims' rights. [364] This provision was designed to ensure that victims' rights are not inadvertently lost because a victim lacks legal counsel. As Senator Kyl explained, "This provision also recognizes that, at times, the government's attorney may be best situated to assert a crime victim's rights … because the crime victim is not available at a particular point in the trial … ." [365] In light of its obligations to accord victims their rights and to enforce those rights, the government should at least inform the court when a victim has concerns about a transfer.

Rule 21 - Victims' Views Considered Regarding Transfer for Prejudice The Proposals:

I proposed that Rule 21 be amended to require consideration of the victim's interest in whether a case should be transferred as follows:

(e) Victims' Views. The court shall not transfer any proceeding without giving any victim an opportunity to be heard. The court shall consider the views of the victim in making any transfer decision. [366]

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[360] ***CVRA*** Subcommittee Memo, supra note 66, at 17.

[361] Id. (emphasis added).

[362] Cf. *State v. Casey, 2002 UT 29, PP 9-13, 44 P.3d 756* (noting prosecutors' obligation to relay to the court victim's request to be heard).

[363] *18 U.S.C. § 3771*(c)(1) (2006).

[364] Id. § 3771(d)(1).

[365] 150 Cong. Rec. S10912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[366] Cassell, Proposed ***Amendments***, supra note 4, at 880.

The Advisory Committee recommended no change to this rule. [367]

Discussion:

The Advisory Committee rejected this change because, in its view, the fact that the ***CVRA*** did not specifically address transfer decisions precluded any ***amendment***:
[*924]

Judge Cassell grounds his proposal on the general provision of the ***CVRA*** that gives a victim a right to be treated with "fairness." *18 U.S.C. § 3771*(a)(8). The Subcommittee was not persuaded that this general language warranted an ***amendment*** that would require the court to consider the victim's views. In the case of transfers for prejudice, the preferences of the victim could not outweigh the defendant's right to a fair proceeding. In the case of transfers for convenience, the statutory right to confer with the attorney for the government provides the mechanism for incorporating the victim's views. As in the case of Rule 20, the Subcommittee declined to go beyond the carefully crafted limitations of the statute. In appropriate cases, the attorney for the government should appraise the court of the victim's views. [368]

Once again, the Advisory Committee's position clashes with the statute. The Committee does not argue (nor does it seem plausible to argue) that transferring a case to a distant location without even considering the victim's view treats the victim fairly. Instead, the Committee ducks the implications of the right to fairness because it is "general language," as though a "general" command from Congress can be ignored.

Perhaps recognizing the weakness of its position, the Advisory Committee goes on to craft a policy argument against victims being heard. It divides transfer cases into two types - those for convenience and those for prejudice - and concludes that victims should not enjoy a guaranteed right to be heard in either situation. In neither case is the analysis convincing.

With regard to transfers for convenience, the Committee contends that the victim's right to confer with prosecutors is sufficient protection. But a victim's conference with those very same government authorities who find it convenient to move the case hardly will give victims much comfort - much less the right to fairness that Congress has mandated. The Committee also is less than clear when it directs prosecutors to advise the court of the victim's objections "in appropriate cases." It is hard to think of any case when a prosecutor would be justified in concealing an unrepresented victim's concerns from the court. [369] It is far simpler - and, more to the point, simply fair - to ensure that the court will always consider a victim's views on transfer.

With regard to transfers to avoid prejudice, the Advisory Committee concludes that a victim's views could not "outweigh" the defendant's right to a fair proceeding. But no one argues that victims' views will necessarily outweigh a defendant's argument; the limited point is simply that victims' views should be considered in the balance. Moreover, a victim may be able to demonstrate that a defendant's argument is unsupported or that other, less burdensome alternatives to **[*925]** transferring a case exist. Surely these are sufficiently important reasons to let a victim be heard before a case is moved.

The Advisory Committee also appears to overlook the constitutional grounding that a victim's opposition to a transfer decision enjoys. In contrast to the ***Sixth Amendment***, which gives defendants in a state prosecution a right to trial in their home state, [370] Article III simply commands that in a federal prosecution, "the Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes have been committed." [371] This Article III vicinage right was designed to protect not only the rights of the defendant but also the rights of the community - including victims in the

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[367] Proposed ***Amendments***, supra note 71.

[368] ***CVRA*** Subcommittee Memo, supra note 66, at 17-18.

[369] In the case of a represented victim, the prosecutor could reasonably rely on the victim's counsel to present appropriate arguments.

[370] ***U.S. Const. amend. VI*** ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed … ." (emphasis added)).

[371] U.S. Const. art. III, § 2 (emphasis added).

community. [372] The provision is designed to secure a trial within the same political community ("the state") in which the victim would likely reside. [373]

The Supreme Court's decisions on right of public access to trials bolsters the understanding of the Article II's provision to protect the community interest. In cases such as Richmond Newspapers, Inc. v. Virginia, the Court has held that implicit in the First ***Amendment*** is a guarantee of the public's right to attend trials. [374] Compelling victims' interests underlie this guarantee. As the Court has explained, "public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct." [375] And as Justice Blackmun has emphasized, "The victim of the crime, the family of the victim, [and] others who have suffered similarly, … . have an interest in observing the course of a prosecution." [376] Victims are vitally interested in observing criminal trials because society has withdrawn "both from the victim and the vigilante the enforcement of criminal laws, but [it] cannot erase from people's consciousness the fundamental, natural yearning to see justice done - or even the urge for retribution." [377]

For purposes of this Article, it is not necessary to definitively trace how victims' constitutional interests play out against a defendant's right to avoid a prejudicial trial. The very limited point here is merely that victims should be heard on any transfer, so that a judge can make a fully informed decision. Even if the judge determines to transfer a case, the victim may have valuable information for the judge on where to transfer the case (for example, to an adjacent district or state **[*926]** rather than a distant one) or how to impanel an unbiased jury (for example, importing a jury rather than exporting the trial). [378]

An illustration of the general approach of the proposed rule comes from the leading case of State v. Timmendequas, [379] decided by the New Jersey Supreme Court. In Timmendequas, the trial judge imported a jury from a distant community to hear a capital case rather than forcing the family of a murdered young girl to travel to another district. [380] Construing New Jersey state law provisions similar to the ***CVRA***'s, the New Jersey Supreme Court explained that the trial judge properly considered the views of the victim's family:

Over the past decade, both nationwide and in New Jersey, a significant amount of legislation has been passed implementing increased levels of protection for victims of crime. Specifically, in New Jersey, the Legislature enacted the "Crime Victim's Bill of Rights." That ***amendment*** marked the culmination of the Legislature's efforts to increase the participation of crime victims in the criminal justice system.

The purpose of the Victim's Rights ***Amendment*** was to "enhance and protect the necessary role of crime victims and witnesses in the criminal justice process. In furtherance of [that goal], the improved treatment of these persons should be assured through the establishment of specific rights." One of the enumerated rights guaranteed for victims is "to have inconveniences associated with participation in the criminal justice process minimized to the fullest extent possible."

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[372] See also Drew L. Kershen, Vicinage, 29 Okla. L. Rev. 801 (1976). See generally Cassell, Proposed ***Amendments***, supra note 4, at 880-84; Steven A. Engel, The Public's Vicinage Right: A Constitutional Argument, *75 N.Y.U. L. Rev. 1658 (2000).*

[373] See *United States v. Bishop, 76 F. Supp. 866, 868 (D. Or. 1948).*

[374] *448 U.S. 555, 575-76 (1980).*

[375] *Press-Enter. Co. v. Superior Court, 464 U.S. 501, 509 (1984).*

[376] *Gannett Co. v. DePasquale, 443 U.S. 368, 428 (1979)* (Blackmun, J., concurring in part and dissenting in part).

[377] *Richmond Newspapers, 448 U.S. at 571.*

[378] See generally Beloof, Cassell & Twist, supra note 6, at 392-99 (reviewing caselaw on the victim's interest in venue decisions).

[379] *737 A.2d 55 (N.J. 1999),* cert. denied, ***534 U.S. 858 (2001).***

[380] *Id. at 64-69.*

… .

… . The [trial] court explicitly stated that it was not favoring the rights of the victims over those of defendant. Rather, it was simply taking their concerns into consideration, as it had not done previously. Taking the concerns of the victim's family into account does not constitute error, provided that the constitutional rights of the defendant are not denied or infringed on by that decision. [381]

Timmendequas demonstrates that victims can have legitimate interests in transfer decisions that can be accommodated without violating defendants' rights. Rule 21 ought to be amended to allow victims to provide that kind of information to the judge before any transfer decision is made. [382]

[*927] Rule 23 - Victims' Views Considered Regarding Nonjury Trial The Proposals:

I proposed that the court should be required to consider the views of victims before allowing waiver of a jury trial as follows:

Rule 23. Jury or Nonjury Trial

(a) Jury Trial. If the defendant is entitled to a jury trial, the trial must be by jury unless:

(1) the defendant waives a jury trial in writing;

(2) the government consents; and

(3) the court approves after considering the views of any victims. [383]

The Advisory Committee did not recommend any change to this rule. [384]

Discussion:

Here again, the Advisory Committee declined to adopt my recommendation because it goes "beyond the specific provisions of the ***CVRA***, which do not address the issues whether the trial should be to the court or to a jury." [385] It is not necessary to repeat the arguments about the victim's right to fairness here, other than to note that the "preferred" trial method in the federal courts is a jury trial. [386] Why it is fair to deviate from that preferred method without first listening to the victims is not immediately clear.

But, for the sake of argument, assume that nothing in the ***CVRA*** requires the Advisory Committee to change this rule. The fact remains that the Advisory Committee could still change the rule if there were good reasons to do so. In view of this fact, it is surprising that the Committee never defends the logic behind allowing a court to dispense with a jury trial without even hearing from a victim. To help protect the general public interest in trial by jury, Rule 23 currently requires not only prosecutor

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[381] *Id. at 76* (citations omitted). The hardship to the victim was established via affidavits from the victim's family provided to the court by the prosecutor. Id.

[382] The Advisory Committee recently recommended a change to Rule 21(b) that does not address the points concerned in this Article. See infra notes 585-586 and accompanying text.

[383] Cassell, Proposed ***Amendments***, supra note 4, at 884.

[384] Proposed ***Amendments***, supra note 71.

[385] ***CVRA*** Subcommittee Memo, supra note 66, at 18.

[386] *Singer v. United States, 380 U.S. 24, 35 (1965)* ("Trial by jury has been established by the Constitution as the "normal and … preferrable mode of disposing of issues of fact in criminal cases.'") (alteration in original) (citation omitted). See generally Rachel E. Barkow, Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing, *152 U. Pa. L. Rev. 33, 68 (2003).*

approval, [387] but also court approval. [388] Any approval **[*928]** requires careful weighing of the competing concerns. The Supreme Court has instructed that

the duty of the trial court … [in considering whether to approve a jury trial waiver] is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity. [389]

This is a "serious and weighty responsibility." [390]

To discharge that serious and weighty responsibility, the Advisory Committee should draft Rule 23 so that the trial court should receive as much relevant information as possible. The victim may be well situated to provide useful information about how the public will view a nonjury trial. The proposed rule change takes the modest step of allowing the victim to be heard before the court approves any nonjury trial.

(New) Rules 32(e), (f), (h), and (i) - Disclosure of the Presentence Report to Victims and Opportunity for Victims to Object and Be Heard [391] The Proposals:

In the federal system, the presentence report is a critical part of the sentencing process. I therefore recommended that the prosecutor should be required to disclose relevant parts of the presentence report to victims as follows:
[*929]

(e) Disclosing the Report and Recommendation.

(1) Time to Disclose. Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(2) Minimum Required Notice. The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period. The attorney for the government shall, if any victim requests, communicate the relevant contents of the presentence report to the victim.

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[387] *Fed. R. Crim. P. 23(a)(2)*. See generally ABA Standards for Criminal Justice § 15-1.2, cmt. at 15.17 (2d ed. 1980) (concluding that arguments in favor of requiring prosecutorial approval of jury trial waivers outweigh those against). But see Adam H. Kurland, Providing a Federal Criminal Defendant with a Unilateral Right to a Bench Trial: A Renewed Call to Amend *Federal Rule of Criminal Procedure 23(a)*, 26 U.C. Davis L. Rev. 309, 316 (1993) (arguing that the requirements of prosecutorial consent and court approval should be removed from Rule 23(a)).

[388] *Fed. R. Crim. P. 23(a)(3)*; cf. Akhil Reed Amar, The Bill of Rights as a Constitution, *100 Yale L.J. 1131, 1196-98 (1991)* (suggesting that jury trial right might not be waivable).

[389] *Patton v. United States, 281 U.S. 276, 312-13 (1930)* (internal quotation marks omitted).

[390] *United States v. Saadya, 750 F.2d 1419, 1421 (9th Cir. 1985)* (internal citation omitted).

[391] In addition to the changes to Rule 32 discussed here, the Advisory Committee essentially adopted verbatim my proposals to amend Rules 32(a), 32(c)(1)(B), and 32(d)(2)(B). Compare Cassell, Proposed ***Amendments***, supra note 4, at 886, 887, 891, with Proposed ***Amendments***, supra note 71, R. 32(a), 32(c)(1)(B), 32(d)(2)(B), at 10-15. There is, accordingly, no need to discuss those proposed rules here.

The Advisory Committee also declined to add my proposal that the probation officer determine whether the victim wished to have any material included in the presentence report. See Cassell, Proposed ***Amendments***, supra note 4, at 889. I will rely on my original article to make the case for this particular change. See id. at 889-91

(3) Sentence Recommendation. By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence. [392]

I further recommended that victims be given the opportunity to object to and be heard on disputed issues in the presentence report as follows:

(f) Objecting to the Report.

(1) Time to Object. Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report. The attorney for the government or for the victim shall raise for the victim any reasonable objection by the victim to the presentence report.

(2) Serving Objections. An objecting party must provide a copy of its objections to the opposing party and to the probation officer.

(3) Action on Objections. After receiving objections, the probation officer may meet with the parties and the victim to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

… .

(h) Notice of Intent to Consider Other Sentencing Factors. [393] Before the court may rely on a ground not identified either in the **[*930]** presentence report or in a party's prehearing submission or in a victim impact statement, the court must give the parties reasonable notice that it is contemplating either departing from the applicable guideline range or imposing a non-guideline sentence. The notice must specify any ground not earlier identified on which the court is contemplating a departure or a non-guideline sentence. The attorney for the government or for the victim shall advise defense counsel and the court of any ground identified by the victim that might reasonably serve as a basis for departure.

(i) Sentencing.

(1) In General. At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of - or summarize in camera - any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys and any victims to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party or any victim to make a new objection at any time before sentence is imposed.

(2) Introducing Evidence; Producing a Statement. The court may permit the parties or the victim to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)-(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(3) Court Determinations. At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

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[392] Cassell, Proposed ***Amendments***, supra note 4, at 892.

[393] This rule was amended in December 2006, after my earlier article was published, to change "departure" language to conform with the new, post-Booker regime. I have accordingly changed the language quoted in the text above to conform to the current language.

(B) must - for any disputed portion of the presentence report or other controverted matter - rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

[*931] (C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons. [394]

The Advisory Committee recommended no changes to these rules. [395]

Discussion:

The ***CVRA*** entitles victims to be heard on disputed Federal Sentencing Guidelines ("Guidelines") issues and, as a consequence, to review parts of the presentence report relevant to those issues. The ***CVRA*** gives victims "the right to be reasonably heard at any public proceeding in the district court involving … sentencing." [396] The ***CVRA*** provision (among other things) codifies the right of crime victims to give in court what is known as a "victim impact statement." [397]

The victim's right to be heard, however, is not narrowly circumscribed to just impact information. To the contrary, the right conferred is a broad one - to be "reasonably heard" at the sentencing proceeding. The victim's right to be "reasonably heard" implicitly includes a right for the victim to speak to disputed Guidelines issues. As Senator Kyl explained, the victim's right includes the right to make sentencing recommendations:

When a victim invokes this right during … sentencing proceedings, it is intended that he or she be allowed to provide all three types of victim impact: the character of the victim, the impact of the crime on the victim, the victim's family and the community, and sentencing recommendations. [398]

A "sentencing recommendation" will often directly implicate Guidelines issues, particularly where a court gives significant weight to the Guidelines calculation (as most currently do). [399] For example, if the victim wishes to recommend a sixty-month sentence when the maximum guideline range is only thirty months, that sentencing recommendation may be meaningless unless a **[*932]** victim can provide a basis for recalculating the Guidelines or departing or varying [400] from the Guidelines.

Congress intended the victim's right to be heard to be construed broadly, as Senator Feinstein stated: "The victim of crime, or their counsel, should be able to provide any information, as well as their opinion, directly to the court concerning the … sentencing of the accused." [401] Again, it is hard to see how victims can meaningfully provide "any information" that would have a bearing on the sentence without being informed of the Guidelines calculations that likely will drive the sentence.

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[394] Cassell, Proposed ***Amendments***, supra note 4, at 901-02.

[395] See Proposed ***Amendments***, supra note 71.

[396] *18 U.S.C. § 3771*(a)(4) (2006).

[397] See generally Beloof, Cassell & Twist, supra note 6, at 625-90 (discussing victim impact statements); Cassell, Balancing the Scales, supra note 6, at 1395-96.

[398] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added). See generally Beloof, Cassell & Twist, supra note 6, at 625-90 (discussing three types of victim impact information).

[399] See, e.g., *United States v. Wilson, 350 F. Supp. 2d 910, 925 (D. Utah 2005)* (giving "heavy weight" to the Guidelines' recommendation).

[400] See *United States v. Wilson, 355 F. Supp. 2d 1269, 1272 (D. Utah 2005)* (discussing "departures" and "variances").

[401] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein) (emphasis added).

In addition, an independent basis for victims reviewing presentence reports is the victim's broad right under the ***CVRA*** to be "treated with fairness" [402] and right to restitution, as I argued in my earlier article. [403]

Thus, the ***CVRA*** should be understood as giving victims the right to relevant information in the presentence report about the Guidelines and to be heard before a court makes any final conclusions about Guidelines calculations and other sentencing matters. Many states follow a similar approach and give victims access to presentence reports as part of the victim-impact process. [404]

Since I made my proposal, the Ninth Circuit has considered the question of whether to reverse a district court that declined to provide the entire presentence report to a fraud victim. In an opinion containing only one substantive paragraph, the Ninth Circuit affirmed the district court, which had rejected a victim's argument that "the ***CVRA*** confers a general right for crime victims to obtain **[*933]** disclosure of the [presentence report]." [405] The Ninth Circuit stated tersely that the district court did not "commit legal error." [406]

Although strong arguments can be made against Kenna, [407] the case is not on point to my proposal. First, Kenna involved a claim of a "general right" to access to the presentence report, apparently untethered to any particular need for access. My ***amendment*** would be limited to situations where victims seek "relevant" contents of the presentence report to make a victim impact statement at sentencing. Second, the victim in Kenna sought the entire presentence report. The Ninth Circuit pointedly observed: "We note that Kenna refused the district court's offer to consider disclosure of specific portions of the [presentence report]." [408] My proposal tracks what the district court offered to Kenna - that a victim would have access to "relevant contents of the presentence report."

Because victims have a right of access to relevant parts of the presentence report, the question then arises of how to provide that access. In my earlier article, I recommended the simplest solution to the competing concerns would be to disclose the report, upon request, to victims through the prosecutor. The prosecutor could filter out irrelevant confidential information and assist the victim by highlighting critical parts of the report. It might be objected that this approach would burden prosecutors.

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[402] *18 U.S.C. § 3771*(a)(8) (2006).

[403] Cassell, Proposed ***Amendments***, supra note 4, at 894-96; see also Testimony of Paul G. Cassell to the U.S. Sentencing Comm'n (Feb. 15, 2005), available at *http://www.ussc.gov/hearings/02_15_05/cassell_testimony.pdf* (last visited Feb. 22, 2008) (advancing similar arguments).

[404] *Ala. Code § 15-23-73(b)* (1995) (giving victim "right to review a copy of the presentence investigative report, subject to the applicable federal or state confidentiality laws"); *Alaska Stat. § 12.55.023* (2006) (giving victim right to look at portions of sentencing report); Ariz. Const. art. II, § 2.1(a)(7) (giving victim right to review presentence report when available to the defendant); *Ariz. Rev. Stat. Ann. § 13-4425* (2001) (giving victim right to review presentence report "except those parts excised by the court or made confidential by law"); Col. Rev. Stat. § 24-72-304(5) (2007) (giving prosecutor discretion to allow victim or victim's family to see presentence report); *Fla. Stat. § 960.001(1)(g)(2)* (2006) (giving victim right to review presentence report); *Idaho Code Ann. § 19-5306(1)(a)* (2002) (giving victim right to review presentence report); *Ind. Code § 35-40-5-6(b)* (1998) (giving victim right to read and "respond to" material contained in the presentence report); La. Const. art. I, § 25 (giving victim "right to review and comment upon the presentence report"); *Mont. Code Ann. § 46-18-113(1)* (2007) (giving prosecutor right to disclose contents of presentence report to victim); *Or. Rev. Stat. § 137.077(2)* (2005) (presentence report must be made available to victim).

[405] *In re Kenna, 453 F.3d 1136, 1137 (9th Cir. 2006).*

[406] Id.

[407] See *Brief for the Petitioner, In re Kenna, 453 F.3d 1136 (9th Cir. 2006)* (No. 06-73352). Cf. Matthew B. Riley, Note, Victim Participation in the Criminal Justice System: In re Kenna and Victim Access to Presentence Reports, *2007 Utah L. Rev. 235, 235* (discussing Kenna and urging that crime victims receive "as much of the report as possible without infringing on specific privacy concerns held by criminal defendants").

[408] *In re Kenna, 453 F.3d at 1137.*

But the ***CVRA*** already gives victims the right to "confer" with prosecutors [409] - and presumably they will be conferring regarding the important topic of sentencing. It is important to emphasize that my proposal would require prosecutors to give all relevant information to the victim; in other words, prosecutors would serve as a conduit to the victim, but not a controller of the victim.

The Advisory Committee declined to adopt my proposal, opining that "the prosecutor should remain the victim's source of information regarding the sentencing process and the contents of the presentence report, and the prosecutor should have discretion to determine what information from the presentence report should be imparted to the victim." [410] This reasoning clashes directly with the ***CVRA***'s guiding principle: that victims deserve their own rights in the criminal process. Congress wanted victims to become participants with rights "independent of the government or the defendant … ." [411] For this reason, the ***CVRA*** allows the **[*934]** victim to assert rights independently of the government. [412] Senator Kyl explained the victim's right to independent action directly: "[There is no authority for] the government's attorney … to compromise or co-opt a victim's right… . The rights provided in this bill are personal to the individual crime victim and it is that crime victim that has the final word regarding which of the specific rights to assert and when." [413]

One of the victim's independent rights includes the opportunity to make "sentencing recommendations." [414] Congress's command that victims be independent participants cannot be faithfully implemented if prosecutors control the information victims receive. If allowed to do so, prosecutors could simply feed the victim information supporting the government's view, while withholding information undercutting it. [415] Nothing in the ***CVRA*** provides any support for this approach. [416]

The Advisory Committee was also concerned that presentence reports "are typically treated as confidential, because they include a great deal of personal information about the defendant … ." [417] But this concern was easily handled by my requirement that prosecutors pass along only "relevant" contents of the presentence reports. Personal information only tangentially connected to sentencing issues would not be disclosed. And if personal information about the defendant were directly connected to sentencing issues, then fairness entitles the victim to that information to formulate a sentencing recommendation. After all, by the time of sentencing, the defendant has been found guilty, beyond a reasonable doubt, of harming a victim. By committing a crime against the victim, the defendant has certainly forfeited some privacy interests - including the chance to keep from the victim information relevant to sentencing. It is also important to recall that this information is not truly confidential in the sense that no one else **[*935]** will see it. It has already been disclosed to the probation officer, defense counsel, the prosecutor, and the judge.

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[409] *18 U.S.C. § 3771*(a)(5) (2006).

[410] ***CVRA*** Subcommittee Memo, supra note 66, at 18.

[411] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[412] See *18 U.S.C. § 3771*(d)(1) (a victim's rights may be asserted by both the prosecutor and the victim or victim's representative).

[413] 150 Cong. Rec. S10,912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[414] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[415] The Advisory Committee's view that prosecutors should control what information the victim receives is so fundamentally at odds with the animating principles of the ***CVRA*** that it makes one wonder where it came from. Interestingly the view seems to have originated in a small subcommittee with a representative from the Justice Department but no crime victims rights representative. See ***CVRA*** Subcommittee Memo, supra note 66, at 1 (noting that Deborah Rhodes, Counselor to the Asst. Atty. Gen. of the Criminal Division, served on the subcommittee drafting this language).

[416] At another point in its memorandum, the ***CVRA*** Subcommittee refers to *18 U.S.C. § 3771*(d)(6), which provides that "nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." ***CVRA*** Subcomittee Memo, supra note 66, at 20. But the simple act of giving information in a court document (the presentence report) to crime victims does not impair the government's decision of whether and how to prosecute a defendant. See supra notes 363-365 and accompanying text (discussing impairment issue under Rule 20).

[417] ***CVRA*** Subcommittee Memo, supra note 66, at 18.

Once the victim receives relevant information from a presentence report, the victim no less than other participants at sentencing should be entitled to be heard on any disputed issues. For example, in a fraud case, if the defendant claims to have swindled only $ 5,000 and the government claims the loss is $ 10,000, the victim should be entitled to press her argument that the loss was $ 40,000. To do otherwise, is to deprive the victim of an opportunity to participate in the sentencing process and to turn the victim impact statement into a meaningless charade.

The Advisory Committee's view on this point is curious. The Advisory Committee did not directly quarrel with the position that victims should have the opportunity to be heard on disputed sentencing issues. Instead, the Advisory Committee would only go so far as to suggest that it

felt it would be desirable for the courts gradually to flesh out what the right to be heard means in this [sentencing] context (determining, for example, when the right to be heard would include the right to introduce evidence). It is by no means clear that the ***CVRA*** contemplates that victims will be entitled to access all of the particulars of the presentence report and be entitled to litigate issues concerning the application of various guidelines, etc. [418]

This view is objectionable on many levels. First, given the congressional purpose of fundamentally changing the way crime victims are treated in the criminal justice process, it can hardly be desirable for courts to "gradually" determine what rights victims have. As Senator Kyl explained, "A central reason for these rights is to force a change in a criminal justice culture which has failed to focus on the legitimate interests of crime victims." [419] The ***CVRA*** was "meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process." [420]

Second, the Committee diffidently opines that "it is by no means clear" that victims have the right to litigate disputed issues. [421] I will turn to the substance of that claim shortly. But even assuming it to be true, a fundamental purpose of the Federal Rules of Criminal Procedure is to provide clarity on issues that would otherwise have to be litigated. [422] The Advisory Committee could be "clear" that victims can litigate by simply putting in place my proposed rule. To do otherwise **[*936]** is, unfortunately, to invite continued uncertainty over a point of vital importance to crime victims.

Finally, perhaps the reason that the Advisory Committee would venture only that it is unclear whether victims have the right to dispute sentencing issues was a reluctance to stake out the contrary position. To maintain that victims cannot dispute sentencing issues would collide with both statutes and common sense. As for statutory requirements, it is hard to understand how victims will be "reasonably heard" at sentencing (as the ***CVRA*** commands) if they cannot contest the factors that may well drive a sentence - the Guidelines calculations. Moreover, Congress has already directly mandated that victims will have the opportunity to dispute sentencing factors when they relate to restitution. [423] Thus, if the Advisory Committee really wanted to stake out a victims-can't-litigate-at-sentencing position, it would have to awkwardly carve out a restitution exception. Finally, a victim is simply not treated with "fairness" if she is entirely excluded from the Guidelines process. The Supreme Court has explained that "it is … fundamental that the right to … an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner.'" [424] It is not "meaningful" for victims to make sentencing recommendations without the benefit of knowing what everyone else in that courtroom knows - what the recommended Guidelines range is. Yet Congress plainly

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[418] ***CVRA*** Subcommittee Memo, supra note 66, at 19.

[419] 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[420] Id. (statement of Sen. Kyl); see also 150 Cong. Rec. S4263 (Apr. 22, 2004) (statement of Sen. Feinstein) (describing the ***CVRA*** as a "new and bolder approach than has ever been tried before in our Federal System").

[421] ***CVRA*** Subcommittee Memo, supra note 66, at 19.

[422] See supra notes 103-310 and accompanying text (providing illustrations of rules changes made to provide clarity).

[423] See *18 U.S.C. § 3664*(d)(2)(A) (2006) (probation officer shall disclose to victim amount subject to restitution as calculated by the probation officer and the opportunity of the victim to file an affidavit seeking greater restitution); see also id. § 3771(a)(6) (giving victims "the right to full and timely restitution as provided in law").

[424] *Fuentes v. Shevin, 407 U.S. 67, 80 (1972)* (quoting *Armstrong v. Manzo, 380 U.S. 545, 552 (1965))* (emphasis added).

intended to pass a law establishing "fair play for crime victims, meaningful participation of crime victims in the justice system, protection against a government that would take from a crime victim the dignity of due process … ." [425]

By building victims into the Guidelines process, my proposal would also provide an important procedural protection to defendants. My proposed ***amendment*** to Rule 32(f) would require that the victim's attorney or the prosecutor would raise any reasonable objection to the presentence report before the sentencing hearing, so that it could be discussed at a presentence conference and then presented in an organized fashion to the sentencing judge. I would also require either the victim's attorney or the prosecutor to give notice to defense counsel and the court where an upward departure argument might rest on any information provided by the victim. [426] Setting up the procedures in this way creates an orderly process for victim objections to affect sentencing - with fair notice to the defense. Otherwise, the court - and the defendant - might hear for the first time at sentencing that the prosecution was considering an upward departure based on information in the victim impact statement.

[*937] The courts of appeals have split on the need for advance notice of an upward departure based on victim impact statements. In United States v. Dozier, the Tenth Circuit held that a district court is required to give notice to a defendant before departing upward from the advisory guideline range based on victim impact statements. [427] The breadth of that holding may be limited, however, by unusual facts: the presentence report did not identify victim impact information as a possible basis for an upward departure and the government conceded that a sentencing remand was appropriate. The Third Circuit has expressly declined to follow Dozier. In United States v. Vampire Nation, [428] the Third Circuit held that, in light of the Supreme Court's decisions making the Guidelines advisory, [429] a defendant is always on notice that a judge might find a sentencing factor calling for a sentence higher than that advised by the Guidelines. [430] With respect to victim impact statements, the Third Circuit highlighted the fact that victim impact statements at the sentencing hearing might provide a new, previously undisclosed ground for an upward (or downward) departure:

The right of victims to be heard is guaranteed by the Crime Victims' Rights Act ("***CVRA***") … . The right is in the nature of an independent right of allocution at sentencing. See *18 U.S.C. § 3771*(a)(4) (affording victims a "right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding"). Under the ***CVRA***, courts may not limit victims to a written statement. See *Kenna v. United States District Court, 435 F.3d 1011, 1017 (9th Cir. 2006)* (Kozinski, J.) ("Limiting victims to written impact statements, while allowing the prosecutor and the defendant the opportunity to address the court, would treat victims as secondary participants in the sentencing process. The ***CVRA*** clearly meant to make victims full participants."). Given that it would be impossible to predict what statements victims might offer at sentencing, it would be unworkable to require district courts to provide advance notice of their intent to vary their discretionary sentence based on victim statements that had not yet been made. [431]

The contrasting positions of the Tenth and Third Circuits is part of a larger disagreement between the circuits on the extent to which the notice requirements in the criminal rules continue to operate under the now-advisory Guidelines regime. [432]

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[425] 150 Cong. Rec. S4264 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added); see also *Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1017 (9th Cir. 2006).*

[426] See Cassell, Proposed ***Amendments***, supra note 4, at 901-03.

[427] *444 F.3d 1215, 1217-18 (10th Cir. 2006).*

[428] *451 F.3d 189 (3d Cir. 2006),* cert. denied, ***127 S. Ct. 424 (2006).***

[429] See *United States v. Booker, 543 U.S. 220, 222 (2004).*

[430] *Vampire Nation, 451 F.3d at 196.*

[431] *Id. at 197 n.4.*

[432] The Second, Fourth, and Ninth Circuits have ruled that Rule 32(h) continues to apply. See *United States v. Anati, 457 F.3d 233, 236-37 (2d Cir. 2006); United States v. Davenport, 445 F.3d 366, 371 (4th Cir. 2006); United States v. Evans-Martinez, 448 F.3d 1163, 1167 (9th Cir. 2006).* The Third, Seventh, Eighth, and Eleventh Circuits have held the opposite. See *United States v. Irizarry, 458 F.3d 1208, 1212*

Focusing specifically on the issue of victim impact information, the **[*938]** Third Circuit is correct that, under the current rules, it is "unworkable" to provide advance notice of upward (or downward [433]) departures based on victim allocution at the sentencing hearing. Under my proposal, however, victims would be integrated into the presentence process for determining Guidelines issues, thereby ensuring that the defense has fair notice of any upward departure and the government has fair notice of any downward departure. Regardless of whether the Guidelines are advisory, this is the fairest way to proceed for defendants, the prosecution, and victims.

(New) Rule 32(i)(4) - Victims' Right to be Reasonably Heard at Sentencing The Proposals:

Even before passage of the ***CVRA***, the Federal Rules of Criminal Procedure gave victims of crimes of violence or sexual abuse the right to be heard at sentencing. After the ***CVRA*** extended such rights to all victims, I proposed simply striking the limitation in the rule so that it would apply to all victims as follows:

(B) By a Victim. Before imposing sentence, the court must address any victim of a the crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence … . [434]

The Advisory Committee tracked my change of striking the crimes of violence and sexual abuse limitation; but the Committee also substituted language from the ***CVRA*** about being reasonably heard as follows:

(B) By a Victim. Before imposing sentence, the court must address any victim of a the crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence to be reasonably heard. [435]

[*939] Discussion:

My proposal retained the current language in Rule 32 allowing the victim "to speak or submit any information about the sentence"; the Advisory Committee would allow the victim "to be reasonably heard" at sentencing - language lifted from the ***CVRA***.

In this area, the Advisory Committee has paradoxically used the ***CVRA*** as an occasion for possibly restricting victims' rights. Under Rule 32(i)(4)'s current language, there is no doubt that the victim could "speak" at sentencing (that is, give an oral statement). Under the proposed language, litigation could result about whether victims could be "reasonably heard" without being allowed to speak (that is, be confined to purely written submissions). Indeed, during the Advisory Committee meeting on the proposal, the Advisory Committee reporter conceded that "courts would have to construe exactly what [the phrase] meant as situations came before them." [436]

It is worth reflecting for a moment on how backward the Advisory Committee's approach to this issue is. Before the ***CVRA***'s enactment, victims of crimes of violence and sexual assault had the right under Rule 32(i) "to speak" at sentencing (along with the right to submit information). When Congress enacted the ***CVRA***, the Advisory Committee and the Judicial Conference had

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(11th Cir. 2006); United States v. Vampire Nation, 451 F.3d 189, 195-98 (3d Cir. 2006); United States v. Walker, 447 F.3d 999, 1006-07 (7th Cir. 2006); United States v. Egenberger, 424 F.3d 803, 805 (8th Cir. 2005). The First Circuit has held only that the failure to provide notice does not constitute plain error. See United States v. Mateo, No. 06-1805, 2006 WL 1195676, at 1 (1st Cir. May 5, 2006).

[433] For a helpful correction to the idea that victims' interests are always adverse to defense interests at sentencing, see generally Benji McMurray, The Mitigating Power of a Victim Focus at Sentencing, 19 Fed. Sent'g Rep.125 (2006).

[434] Cassell, Proposed ***Amendments***, supra note 4, at 903.

[435] Proposed ***Amendments***, supra note 71, R. 32(i)(4)(B), at 13. The Advisory Committee also proposes striking out existing language in the rule allowing guardians or family members to exercise the right to speak on behalf of minor and incapacitated victims. For criticism of this deletion, see supra notes 117-125 and accompanying text.

[436] Advisory Committee Minutes, supra note 68, at 14 (comment of Prof. Beale).

both approved broadening that rule to give all victims the right to speak. [437] (The Judicial Conference withdrew this proposed rule to allow reconsideration in light of the ***CVRA***.) The ***CVRA*** gave victims the right to be "reasonably heard" at sentencing. Of course, the ***CVRA***'s obvious goal was to significantly expand the rights of crime victims. With respect to the right to speak in particular, one of the ***CVRA***'s primary sponsors stated: "this section would fail in its intent if courts determined that written, rather than oral communication, could generally satisfy this right." [438] Yet, in the wake of all this, the Advisory Committee now proposes a rule that does not guarantee that victims have the right to speak, leaving this to the courts to construe on a case-by-case basis. This retreat on victims' rights truly stands the ***CVRA*** on its head.

The Advisory Committee should directly state that victims have the right to speak at sentencing, as the only courts to have reached the issue have held. [439] For **[*940]** instance, in United States v. Kenna, Judge Kozinski [440] explained that the ***CVRA***'s legislative history "discloses a clear congressional intent to give crime victims the right to speak at proceedings covered by the ***CVRA***." [441] The court first highlighted the following statement by Senator Kyl:

It is not the intent of the term "reasonably" in the phrase "to be reasonably heard" to provide any excuse for denying a victim the right to appear in person and directly address the court. Indeed, the very purpose of this section is to allow the victim to appear personally and directly address the court. [442]

Senator Dianne Feinstein, another primary sponsor of the bill, remarked that Senator Kyl's understanding of the bill was "[her] understanding as well." [443]

In addition to these floor statements, the Kenna court cited a committee report for the proposed constitutional ***amendment*** to protect victims' rights. The Senate Report on the ***amendment*** - an ***amendment*** that contained language nearly identical to the language in the eventually enacted ***CVRA*** - reads that:

The victim's right is to "be heard." The right to make an oral statement is conditioned on the victim's presence in the courtroom … . Victims should always be given the power to determine the form of the statement. Simply because a decision making body, such as the court … has a prior statement of some sort on file does not mean that the victim should not again be offered the opportunity to make a further statement … . The Committee does not intend that the right to be heard be limited to "written" statements, because the victim may wish to communicate in other appropriate ways. [444]

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[437] See Advisory Committee on Criminal Rules, Criminal Rules Docket (Historical), *http://www.uscourts.gov/rules/Criminal_Docket.pdf* (last visited Feb. 22, 2008).

[438] 150 Cong. Rec. S10910, S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[439] See *Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1015-16 (9th Cir. 2006); United States v. Degenhardt, 405 F. Supp. 2d 1341, 1345 (D. Utah. 2005);* see also *United States v. Turner, 367 F. Supp. 2d 319, 333 (E.D.N.Y. 2005)* (opining in dicta that § 3771(a)(4) "requires the victim to be given an opportunity actually to be "heard' rather than afforded some alternate means of communicating her views"); cf. *United States v. Marcello, 370 F. Supp. 2d 745, 749 (N.D. III. 2005)* (holding that in the unique context of detention hearings, victims have no right to speak, particularly when the witness has no direct information to provide the court).

[440] See generally Douglas E. Beloof, Judicial Leadership at Sentencing Under the Crime Victims' Rights Act: Judge Kosinki in Kenna and Judge Cassell in Degenhardt, 19 Fed. Sent'g Rep. 36 (2006) (identifying victims of crime as participants at sentencing by analyzing the ***CVRA*** and the significant caselaw).

[441] *Kenna, 435 F.3d at 1016.*

[442] *Id. at 1015* (quoting 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyle)).

[443] Id. (quoting 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein)).

[444] *Id. at 1016* (quoting S. Rep. No. 108-191, at 38 (2003)).

Based on this legislative history, Kenna concluded that crime victims have the right to speak at ***CVRA***-covered proceedings. [445] Kenna explained that this interpretation advanced the purposes of the ***CVRA***, for the "statute was enacted to **[*941]** make crime victims full participants in the criminal justice system." [446] The Advisory Committee should follow that lead and provide that victims are guaranteed a right to speak at sentencing. [447] Of course, in cases involving numerous victims (for example, a massive fraud case), the ***CVRA*** itself allows courts to fashion a "reasonable procedure" to accommodate the competing concerns. [448]

Rule 44.1 - Discretionary Appointment of Counsel for Victim The Proposals:

I proposed that the court's discretionary authority to appoint counsel for a victim should be included in a new rule as follows:

Rule 44.1 Counsel for Victims.

When the interests of justice require, the court may appoint counsel for a victim to assist the victim in exercising his or her rights. [449]

The Advisory Committee did not propose any change in the Rules on this subject. [450]

Discussion:

The Advisory Committee never discussed this particular proposed change, so it is possible that its failure to adopt it was an oversight. [451] In any event, here it is perhaps useful to emphasize just a few points in favor of this proposal.

While the ***CVRA*** does not create a right to counsel for victims, nothing in the Act deprived the courts of their preexisting inherent authority. The courts generally have the right to appoint volunteer counsel in civil cases, [452] a power that would seem to extend to criminal cases. Indeed, the Supreme Court has left open the question of whether federal courts possess the inherent authority to require counsel **[*942]** to provide legal services to the poor. [453] The local rules of some federal courts already explicitly recognize this power. [454] In addition, Title 28 broadly permits the court in both civil and criminal cases to "request an attorney to represent any person unable to afford counsel." [455] And before Gideon v. Wainwright, [456] courts could request

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[445] Id.

[446] Id.

[447] In possible response to such concerns as I raise here, the Advisory Committee modified the Advisory Committee Note to this rule. See infra notes 587-589 and accompanying text.

[448] *18 U.S.C. § 3771*(d)(2) (2006).

[449] Cassell, Proposed ***Amendments***, supra note 4, at 912-16.

[450] See Proposed ***Amendments***, supra note 71.

[451] See ***CVRA*** Subcommittee Memo, supra note 66, at 17-20 (listing my proposals that the subcommittee decided not to recommend; my proposed Rule 44.1 change not among them).

[452] See generally Judy E. Zelin, Court Appointment of Attorney to Represent, Without Compensation, Indigent in Civil Action, 52 A.L.R. 4th 1063 (1987 & Supp. 2004) (collecting and analyzing cases considering the issue of whether the courts can appoint counsel in civil actions to represent indigents).

[453] *Mallard v. U.S. Dist. Court, 490 U.S. 296, 307, 308 n.8 (1989).*

[454] See, e.g., D. Utah Civ. R. 83-1.1(b)(3) ("Any attorney who is admitted to the bar of this court must agree, as a condition of such admission, to engage in a reasonable level of pro bono work when requested to do so by the court.").

[455] ***28 U.S.C. § 1915***(e)(1) (2006) (emphasis added).

[456] *372 U.S. 335 (1963).*

that lawyers provide assistance to indigent criminal defendants. Presumably, that same power extends to requesting assistance for crime victims. [457] In light of all these facts, federal courts have the inherent power to request attorneys to represent indigent crime victims.

An illustration of this power is found in a decision by the U.S. District Court for the Western District of North Carolina in United States v. Stamper. [458] In this rape case, a dispute arose over the admission of certain psychiatric reports concerning the victim that the defense alleged demonstrated a pattern of making false allegations of sexual abuse. [459] She requested independent counsel to protect her privacy interests. [460] After consulting with the victim, the court appointed counsel for her. [461] The court then allowed her counsel to participate in hearings regarding the evidence, including cross-examination of the relevant witnesses. [462]

My proposed rule would simply confirm the existing discretionary power of the courts to appoint volunteer counsel demonstrated in cases like Stamper. The rule is purely discretionary (the court "may" appoint counsel) and is limited to situations where the interests of justice require appointment. The rule does not address payment for counsel, as this matter must be left to subsequent appropriations from Congress. The court, however, can ask for volunteer counsel to assist victims pro bono.

Finally, it might be argued that it is unnecessary to address this subject in a rule because the court's inherent authority to appoint counsel exists even without a rule. Both courts and victims, however, will find it useful to have this authority close at hand in the criminal rules. Rule 44 already covers the subject of appointing counsel for defendants in great detail, so adding a Rule 44.1 addressing victims' counsel is a natural corollary. In addition, prosecutors are obligated by the ***CVRA*** to "advise the crime victim that the crime victim can seek advice of an attorney with respect to the rights described in subsection (a)." [463] This may frequently **[*943]** require prosecutors to help victims obtain legal counsel. Accordingly, a separate rule on this subject is appropriate. For all these reasons, the Rules should be amended to recognize the court's authority to appoint volunteer counsel to represent a crime victim.

Rule 46 - Victims' Right to Be Heard Regarding Defendant's Release from Custody The Proposal:

I proposed that a victim should be given the right to offer views regarding the defendant's release from custody and that the court should consider those views as follows:

(k) Victims' Right to Be Heard. A victim has the right to be heard regarding any decision to release the defendant. The court shall consider the views of victims in making any release decision, including such decisions in petty cases. In a case where the court finds that the number of victims makes it impracticable to accord all of the victims the right to be heard in open court, the court shall fashion a reasonable procedure to facilitate hearing from representative victims. [464]

The Advisory Committee proposed no change to this rule. [465] It did, however, propose a global rule that would give victims a right to be heard at proceedings involving release:

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[457] See Beloof, Cassell & Twist, supra note 6, at 381-82 (suggesting this conclusion).

[458] *766 F. Supp. 1396, 1397 (W.D.N.C. 1991).*

[459] *Id. at 1396.*

[460] *Id. at 1397.*

[461] Id.

[462] Id.

[463] *18 U.S.C. § 3771*(c)(2) (2006).

[464] Cassell, Proposed ***Amendments***, supra note 4, at 917.

[465] See Proposed ***Amendments***, supra note 71 (showing no proposed change for Rule 46(k)).

Rule 60. Victims

(a) Rights of Victims.

. . . .

(3) Right to Be Heard.

The court must permit a victim to be reasonably heard at any public proceeding in the district court concerning release . . . involving the crime. [466]

Discussion:

The Advisory Committee's global proposal gives victims the right to be "heard" on release decisions; but it fails to spell out what effect, if any, the **[*944]** victim's statement would have after the court heard the victim. In other words, the Advisory Committee proposal seemingly codifies an empty gesture.

In contrast, my proposal would take the straightforward and important step of requiring a court to consider the views of the victim in determining any release decision. [467] That requirement is added directly into the rule governing release decisions - Rule 46. Adding a specific rule with specific consequences is far preferable to the Advisory Committee's approach and is consistent with the ***CVRA***'s goal of ensuring "reasonable conditions of pre-trial and post-conviction relief that include protections for the victim's safety." [468]

Rule 48 - Victims' Views on Dismissal to be Considered The Proposals:

I proposed that the court should be required to consider the views of victims in deciding whether to grant a government's motion to dismiss a case as follows:

Rule 48. Dismissal

(a) By the Government. The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent. In deciding whether to grant the government's motion to dismiss, the court shall consider the views of any victims. [469]

The Advisory Committee proposed no change to this rule. [470]

Discussion:

The Advisory Committee declined to adopt this recommendation for several reasons:

The Subcommittee recognized that victims will have a great interest in whether charges are dismissed. The ***CVRA*** does not, however, explicitly address dismissals, and it speaks only of not excluding the [victim] from, and providing the [victim with] … a right to be reasonably heard at public proceedings in the district court. If the government moves for dismissal there is ordinarily no public proceeding. (When there is a **[*945]** public proceeding, the victim's right not to be excluded, and to be reasonably heard is provided for in Rule [60].)

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[466] Proposed ***Amendments***, supra note 71, R. 60(a)(3), at 16.

[467] Existing law has places where a victim's views could profitably be brought to bear. See, e.g., *18 U.S.C. § 3142*(c) (court to consider whether release of the defendant "will endanger the safety of any other person").

[468] See, e.g., 150 Cong. Rec. S10910, S10910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[469] Cassell, Proposed ***Amendments***, supra note 4, at 918.

[470] See Proposed ***Amendments***, supra note 71 (showing no proposed change for Rule 48).

In light of the statutory statement in *18 U.S.C. § 3771*(d)(6) that nothing in the ***CVRA*** "shall be construed to impair the prosecutorial discretion of the Attorney General," as well as the separation of powers issues raised by judicial review of the government's decision to terminate a prosecution, the Subcommittee was not persuaded that the rule should be amended to require the court to consider the victim's views on dismissal. When there is no public court proceeding, the victim's views will be taken into account through the right to confer with the government under *18 U.S.C. § 3771*(a)(5). [471]

The Advisory Committee's opening premise is clear enough - victims do indeed have "great interest" in whether charges are dismissed. But after this promising start, the Committee's logic is hard to track. The Advisory Committee seems to be of the view that, in situations where a court considers a motion to dismiss at a public proceeding, the victim would be heard. [472] Yet the proposed Rule the Committee cites for this proposition - proposed Rule 60 [473] - is actually drafted so narrowly that the victim would have no right to be heard on such a motion. [474]

In situations where the court considered a motion to dismiss without a public proceeding, the Advisory Committee takes the view that the ***CVRA*** does not "explicitly address" the subject. This view assumes, of course, that the victim's right to fairness does not come into play when the prosecution moves to drop previously filed charges. This assumption is incorrect. Rule 48 already requires leave of court for a dismissal. In determining whether to grant leave, current case law requires the court to consider whether dismissal is "clearly contrary to manifest public interest." [475] The existing caselaw requires that the impact on a victim be considered in addressing a motion to dismiss. A dismissal is "clearly contrary to the public interest" if the prosecutor appears to be motivated by animus toward the victim. [476] Under the command of the ***CVRA***, the victim thus must be treated with fairness when the dismissal motion is addressed, as my proposal provides.

[*946] When the government files a motion to dismiss criminal charges involving a specific victim, the only way to protect that victim's right to be treated fairly is to consider the victim's views on the dismissal. [477] To treat a person with "fairness" is conventionally understood as treating them "justly" and "equitably." [478] A victim is not treated justly and equitably if her views are never before the court.

The Advisory Committee also alludes vaguely to "separation of powers issues raised by judicial review of the government's decision to terminate a prosecution." Here the Advisory Committee may be stepping out of line and questioning the Supreme Court. In 1944, the Court itself added the requirement to Rule 48 that prosecutors obtain leave of court before dismissing any indictment. [479] Thus, if there are separation of powers "issues" about judicial review of dismissals, they have existed for more than half a century by virtue of specific Supreme Court action.

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[471] ***CVRA*** Subcommittee Memo, supra note 66, at 20.

[472] Id. ("When there is a public proceeding, the victim's right not to be excluded, and to be reasonably heard is provided for in Rule [60].").

[473] In the subcommittee draft, the rule cited is actually numbered Rule 43.1. See ***CVRA*** Subcommittee Memo, supra note 66, at 20. Later, without any substantive change, Rule 43.1 was renumbered as Rule 60.

[474] See Proposed ***Amendments***, supra note 71, R. 60, at 15-20 (giving victims a right to be heard only as to proceedings concerning "release, plea, or sentencing") (discussed at infra notes 524-539 and accompanying text).

[475] *United States v. Cowan, 524 F.2d 504, 513 (5th Cir. 1975).*

[476] *In re Richards, 213 F.3d 773, 787 (3d Cir. 2000);* see also *United States v. Hamm, 659 F.2d 624, 629-30 (5th Cir. 1981).*

[477] Accord *United States v. Heaton, 458 F. Supp. 2d 1271, 1272 (D. Utah 2006).*

[478] Black's Law Dictionary 633 (Bryan A. Garner ed., 8th ed. 2004) (defining the adjective "fair").

[479] See *Fed. R. Crim. P. 48* advisory committee's note recounting the history of the 1944 adoption.

The Advisory Committee's next argument is that to allow victims to be heard on dismissals would violate the ***CVRA***'s requirement that nothing in the Act "shall be construed to impair the prosecutorial discretion of the Attorney General." [480] But it is hard to understand how allowing information from a victim to go to a court "impairs" the government's discretion. Particularly given that courts must already review the public interest in reviewing dismissal motions, executive branch power is not impaired when a court hears from a victim in making its determination whether to approve. [481]

The Advisory Committee's final argument is that "when there is no public court proceeding, the victim's views will be taken into account through the right to confer with the government … ." [482] The passive voice ("taken into account") obscures the overarching fact that it is the government itself that is proposing to dismiss the charges. The victim deserves to be heard not merely by the government agency proposing to drop the charges, but by the independent branch of government - the judiciary - that will review that proposal. For all these reasons, Rule 48 should be amended to ensure that victims are heard because charges are dismissed.

[*947] Rule 50 - Victims' Right to Proceedings Free From Unreasonable Delay The Proposals:

I proposed that a victim's right to proceedings free from unreasonable delay should be recognized as follows:

Rule 50. Prompt Disposition

(a) Scheduling Preference. Scheduling preference must be given to criminal proceedings as far as practicable.

(b) Defendant's Right Against Delay. The court shall assure that the defendant's right to a speedy trial is protected, as provided by the Speedy Trial Act.

(c) Victim's Right Against Delay. The court shall assure that a victim's right to proceedings free from unreasonable delay is protected. A victim has the right to be heard regarding any motion to continue any proceeding. If the court grants a motion to continue over the objection of a victim, the court shall state its reasons in the record. [483]

The Advisory Committee proposed no change to this Rule. [484]

Discussion:

Victims have speedy trial rights under the ***CVRA***, which grants victims the right "to proceedings free from unreasonable delay." [485] In addition, child victims previously had the right to a "speedy trial" in certain situations. [486]

In view of these statutory rights, I proposed supplementing the existing rule on scheduling (Rule 50) to fold in victims' rights. The Advisory Committee did not explicitly discuss this proposal, suggesting that its failure to act was possibly due to oversight. [487] Further suggesting oversight is the Advisory Committee's repeated statements that it "sought to incorporate, but not go

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[480] *18 U.S.C. § 3771*(d)(6) (2006).

[481] See *Heaton, 458 F. Supp. 2d at 1271-73* (reaching this conclusion). In Heaton, the government did not challenge this holding and, after the decision requiring it to submit the victim's views, filed a pleading to that effect, all without any apparent separation of powers problem.

[482] ***CVRA*** Subcommittee Memo, supra note 66, at 20.

[483] Cassell, Proposed ***Amendments***, supra note 4, at 918-19.

[484] Proposed ***Amendments***, supra note 71.

[485] *18 U.S.C. § 3771*(a)(7) (2006).

[486] Id. § 3509(j).

[487] See ***CVRA*** Subcommittee Memo, supra note 66, at 17-20 (cataloging my proposals that the subcommittee did not adopt; Rule 50 not mentioned).

beyond, the rights created by statute" and that it "adopted the statutory language whenever possible." [488] Yet under the Advisory Committee's proposed changes, victims' speedy trial rights under the ***CVRA*** are not incorporated into the Rules.

Victims should have their rights regarding scheduling reflected in the rule dealing with scheduling issues. My proposed rule closely tracks the language of **[*948]** the ***CVRA***. [489] It does add a provision that victims would be heard on a motion to continue a proceeding. [490] This provision is consistent with the definitive legislative history. As Senator Kyl explained: "This provision [in the ***CVRA***] should be interpreted so that any decision to schedule, reschedule, or continue criminal cases should include victim input through the victim's assertion of the right to be free from unreasonable delay." [491] My proposed rule also requires that the court state its reason for granting any continuance. This requirement stems from a recommendation from the President's Task Force on Victims of Crime. The Task Force noted "the inherent human tendency to postpone matters, often for insufficient reason," and accordingly recommended that "reasons for any granted continuance … be clearly stated on the record." [492] Several states have adopted similar provisions. [493]

Rule 53 - Closed-Circuit Transmission of Proceedings for Victims The Proposals:

I proposed that closed-circuit transmission of court proceedings for victims should be authorized as follows:

Rule 53. Courtroom Photographing and Broadcasting Prohibited

(a) General Rule. Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.

(b) Closed-Circuit Transmission for Victims. In order to permit victims of crime to watch criminal trial proceedings, the court may authorize closed-circuit televising of the proceedings for viewing by victims or other persons the court determines have a compelling interest in doing so. [494]

The Advisory Committee proposed no change to this rule. [495]

[*949] Discussion:

I proposed to facilitate a victim's protected right to attend a trial by allowing closed-circuit broadcasting of a trial. The Advisory Committee did not act on this proposal for reasons that are unclear, as it did not include this proposed change in the catalog of my proposals that it was rejecting. [496]

Perhaps the Advisory Committee felt that it had sufficiently addressed the subject in its proposed changes to Rule 60. There the Committee simply tracked language in the ***CVRA*** and provided that "if the court finds that the number of victims makes it impracticable to accord all of the victims the rights described in subsection (a), the court must fashion a reasonable procedure

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[488] Proposed ***Amendments***, supra note 71, at 2.

[489] See id.

[490] Id. at 19.

[491] 150 Cong. Rec. S10910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (emphasis added).

[492] President's Task Force, Final Report, supra note 8, at 76.

[493] See, e.g., *Ariz. Rev. Stat. Ann. § 13-4435(B)* (2001) (requiring courts to "state on the record the reason for the continuance"); *Utah Code Ann. § 77-38-7(3)(b)* (2005) (requiring the court to "enter in the record the specific reason for the continuance and the procedures that have been taken to avoid further delays").

[494] Cassell, Proposed ***Amendments***, supra note 4, at 922.

[495] Proposed ***Amendments***, supra note 71.

[496] ***CVRA*** Subcommittee Memo, supra note 66, at 17-20.

to give effect to these rights that does not unduly complicate or prolong the proceedings." [497] Thus, in a situation where numerous victims might overwhelm courtroom seating capacity, the court might craft a reasonable alternative procedure to assure attendance rights. One such reasonable procedure would appear to be closed-circuit transmission of court proceedings to a facility sufficiently large to accommodate all the victims. This was the procedure followed in the Oklahoma City bombing case. [498]

But tracking the ***CVRA*** is not enough. The language for my proposed rule comes from another statute, *42 U.S.C. § 10608*(a), which authorizes closed-circuit transmissions "notwithstanding any provision of the Federal Rules of Criminal Procedure to the contrary" in cases in which a proceeding has been transferred more than 350 miles. [499] The Advisory Committee repeatedly proposed folding language from the ***CVRA*** straight into the Federal Rules of Criminal Procedure. But if the goal is to fold statutes into the Rules, other relevant victims' statutes should be folded in as well.

While folding in a provision on closed-circuit broadcasting, there appears to be no good reason to limit such transmissions to such situations where venue has been transferred. The ***CVRA*** mandates that the courts must always craft "reasonable procedures" to protect the rights of multiple victims. [500] The proposed rule simply authorizes courts to allow such transmissions in appropriate cases. Interestingly, the ***CVRA***'s drafters specifically endorsed the closed-circuit procedure. [501]

[*950] For reasons that have yet to be articulated, the Advisory Committee has not only failed to act on my proposal but it has left in place a conflict between a statute and Rule 53. As noted above, *42 U.S.C. § 10608*(a) specifically trumps Rule 53 in situations where cases have been transferred more than 350 miles. [502] The Rules should at least be amended to fix that conflict. [503] While fixing that problem, the Advisory Committee should also adopt my change, which faithfully implements the ***CVRA***'s commands.

(New) Rule 60(a)(1) - Notice of Proceedings for Victims The Proposals:

I proposed requiring federal prosecutors to give notice to crime victims of their rights and the court process as follows:

Rule 10.1 Notice to Victims.

(a) Identification of Victim. During the prosecution of a case, the attorney for the government shall, at the earliest reasonable opportunity, identify the victims of the crime.

(b) Notice of Case Events. During the prosecution of a crime, the attorney for the government shall make reasonable efforts to provide victims the earliest possible notice of:

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[497] Proposed ***Amendments***, supra note 71, R. 60(b)(3), at 24 (tracking *18 U.S.C. § 3771*(d)(2) (2006)).

[498] Jo Thomas, Trial To Be Shown in Oklahoma for Victims, N.Y. Times, Jan. 30, 1997, at A14; Paul G. Cassell & Robert F. Hoyt, The Tale of Victims' Rights, Legal Times, Dec. 23, 1996, at 32.

[499] *42 U.S.C. § 10608*(a).

[500] *18 U.S.C. § 3771*(d)(2).

[501] See 150 Cong. Rec. S10912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (noting that, because of multiple victims in the Oklahoma City bombing case, closed-circuit broadcasting used; this is "merely one example" of how a court could fashion an appropriate procedure to accommodate multiple victims).

[502] *42 U.S.C. § 10608*(a).

[503] Perhaps it could be argued that Rule 53 itself accommodates any conflict because its prohibition of broadcasting applies "except as otherwise provided by a statute or these rules." *Fed. R. Crim. P. 53*. But reliance on that language is a bit odd because it should go without saying that nothing in the Rules can trump a substantive statute passed by Congress. See *28 U.S.C. § 2072*(b). Moreover, as a simple matter of drafting clarity, it is desirable to have the Rules themselves avoid conflicts with statutes. Otherwise, courts may inadvertently follow the Rules in violation of the statutory command. See, e.g., Cassell, Barbarians at the Gates, supra note 6, at 516 (recounting how this happened in the Oklahoma City bombing case).

(1) The scheduling, including scheduling changes and/or continuances, of each court proceeding that the victim is either required to attend or entitled to attend;

(2) The release or detention status of a defendant or suspected offender;

(3) The filing of charges against a defendant, or the proposed dismissal of all charges, including the placement of the defendant in a pretrial diversion program and the conditions thereon;

(4) The right to make a statement about pretrial release of the defendant;

(5) The victim's right to make a statement about acceptance of a plea of guilty or nolo contendere;

[*951] (6) The victim's right to attend public proceedings;

(7) If the defendant is convicted, the date and place set for sentencing and the victim's right to address the court at sentencing; and

(8) After the defendant is sentenced, the sentence imposed and the availability of the Bureau of Prisons notification program, which shall provide the date, if any, on which the offender will be eligible for parole or supervised release.

(c) Multiple Victims. The attorney for the government shall advise the court if the attorney believes that the number of victims makes it impracticable to provide personal notice to each victim. If the court finds that the number of victims makes it impracticable to give personal notice to each victim desiring to receive notice, the court shall fashion a reasonable procedure calculated to give reasonable notice under the circumstances. [504]

The Advisory Committee proposed to add language in its global victims rule (Rule 60(a)(1)) that would give victims notice only of court proceedings:

Rule 60. Victims

(a) In General.

(1) Notice of a Proceeding. The government must use its best efforts to give the victim reasonable, accurate, and timely notice of any public court proceeding involving the crime. [505]

Discussion:

The difference between my proposal and the Advisory Committee's is that I would give victims notice of both the hearings held in a case and the fact that they can speak at some of those hearings; in contrast, the Advisory Committee would give victims notice only of the hearings. For example, I would place in the rule a requirement that victims be notified of their right to make a statement at bail, plea, and sentencing hearings and told when the hearings would be held. The Advisory Committee would tell the victim only when the hearings would be held. [506]

[*952] The Committee proposal disregards both the law and sound public policy. The ***CVRA*** directs that government investigating and prosecuting agencies "shall make their best efforts to see that crime victims are notified of, and accorded,

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[504] Cassell, Proposed ***Amendments***, supra note 4, at 859-60.

[505] Proposed ***Amendments***, supra note 71, R. 60, at 22.

[506] The Committee did agree with my recommendation that the notice should be provided by the Justice Department, not the courts. See Cassell, Proposed ***Amendments***, supra note 4, at 861-64. Originally, the ***CVRA*** Subcommittee had proposed that the Rules be silent on this important issue. See Advisory Committee Minutes, supra note 68, at 14 (suggesting that "it is not clear whose burden it would be to provide such notice" and "Professor Beale recommended the passive phrasing"). Apparently at some point after the meeting, the Advisory Committee chose to place the notification burden squarely on the government. See *Advisory Committee Report, supra* note 69, at 5. The Advisory Committee apparently recognized that this requirement was already the law, as found in another statute, *42 U.S.C. § 10607*(b), (c)(3)(A)-(D).

their rights [in the ***CVRA***]." [507] Because the Advisory Committee's promised approach was to "incorporate, but not go beyond, the rights created by the statute," [508] it is surprising to see that the Committee decided not to incorporate the ***CVRA***'s right for victims to be "notified of … their rights." Here again, perhaps it simply overlooked this right of victims. [509]

As a policy matter, leaving out this right threatens to cripple crime victims' right to speak at bail, plea, and sentencing hearings. If victims are unaware of their rights to speak, they may unwittingly forfeit that right. Of course, few victims are knowledgeable about the steps in the criminal justice process. Just as criminal defendants receive advice of their Miranda rights, victims should receive advice of their rights.

Although the Committee did not justify its decision to exclude the right to notice, it might conceivably argue that because this right does not involve the conduct of a public judicial proceeding, it does not belong in the Rules. The Committee advanced such an argument to defend its decision to ignore some other aspects of the ***CVRA*** in its proposed rule changes. [510]

Such an argument, at least if advanced with respect to notice issues, would lack merit. First, and most important, the rights at issue are directly bound up with judicial proceedings: at issue is notice about the right to speak at bail, plea, and sentencing proceedings. Moreover, this right directly bears on those proceedings. It is designed to ensure that a judge at these hearings will have all relevant information, including information from crime victims.

Second, it is not true that the Federal Rules of Criminal Procedure only cover judicial proceedings. To provide a few straightforward examples: Rule 11 authorizes prosecutors and defense attorneys to "discuss and reach a plea agreement"; [511] Rule 16 provides that, upon request, a prosecutor "must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control"; [512] Rule 41 requires a police officer executing a search warrant to "give a copy of the warrant and a receipt for the property taken to the person from whom **[*953]** … the property was taken"; [513] and Rule 49 requires parties to serve their legal pleadings on each other. [514] Although these rights may have some ultimate effect on a court proceeding, none of them involves the conduct of a judicial proceeding. If they are "in bounds" for the Rules of Criminal Procedure, the subject of notice about rights to a hearing would seem to fit comfortably as well.

Turning to how to draft a rule giving victims notice of their rights, it is easy to reformulate my proposal so that it tracks the more abbreviated style preferred by the Advisory Committee. Such a rule would read as follows (underlined language being added to the Advisory Committee's proposed language):

(1) Notice of a Proceeding. The government must use its best efforts to give the victim reasonable, accurate, and timely notice of any public court proceeding involving the crime and of the rights the victim has at those proceedings.

It is not unreasonable to ask prosecutors to give victims notice of their rights. As long ago as 1982, the President's Task Force of Victims of Crime concluded that the prosecutor is "in the best position to explain to victims the legal significance of various motions and proceedings." [515] The Attorney General Guidelines for Victim and Witness Assistance already require

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[507] *18 U.S.C. § 3771*(c)(1) (emphases added).

[508] *Advisory Committee Report, supra* note 69, at 2.

[509] See id. at 17-20 (purporting to catalog Cassell proposals rejected; notice of rights not included).

[510] See id. at 13 (listing rights that "seem to fall outside the parameters of the Federal Rules of Criminal Procedure).

[511] *Fed. R. Crim. P. 11(c)(1)*.

[512] Id. 16(a)(1)(E).

[513] Id. 41(f)(1)(C) (Supp. 2007).

[514] Id. 49(a)-(b).

[515] President's Task Force, Final Report, supra note 8, at 64.

prosecutors and their agents to provide notice to crime victims for their rights, [516] as do some states. [517] To ensure that the Justice Department has sufficient resources to provide notice, the ***CVRA*** authorizes $ 25 million over the next five fiscal years to the Office for Victims of Crime of the Department of Justice for enhancement of victim notification systems. [518] The Advisory Committee should therefore add language to its proposed rule change to require prosecutors to give victims notice of their rights.

[*954] (New) Rule 60(a)(1) - Proceeding Without Notice to a Victim The Proposals:

I proposed spelling out what would happen in circumstances where a court wanted to proceed with a hearing but no notice had been given to a victim as follows:

(b) Proceeding With and Without Notice. The court may proceed with a public proceeding without a victim if proper notice has been provided to that victim under Rule 10.1. The court may proceed with a public proceeding (other than a trial or sentencing) without proper notice to a victim only if doing so is in the interest of justice, the court provides prompt notice to that victim of the court's action and of the victim's right to seek reconsideration of the action if a victim's right is affected, and the court ensures that notice will be properly provided to that victim for all subsequent public proceedings. [519]

The Advisory Committee did not propose any such change. [520]

Discussion:

It seemed desirable to me to spell out how courts should proceed when victims lacked notice of a hearing. In contrast, the Advisory Committee has chosen not to address the subject.

By not addressing the subject, the Advisory Committee may be suggesting that the court is forbidden from moving forward when a victim has not been given notice of a proceeding. The caselaw makes clear that when a defendant has not been given notice, any subsequent court action is void. [521] The ***CVRA***'s legislative history shows that the same rule was to apply for victims. As Senator Kyl explained,

It does not make sense to enact victims' rights that are rendered useless because the victim never knew of the proceeding at which the right had to be asserted. Simply put, a failure to provide notice of proceedings at which a right can be asserted is equivalent to a violation of the right itself. [522]

[*955] In light of the fact that a court might otherwise be barred from proceeding when a victim has not been given notice, it still seems preferable to me to spell out a way to allow the court to move forward while simultaneously protecting victims' interests. But I will not elaborate the point further here.

(New) Rule 60(a)(2) - Victims' Right to Attend Trials Both the Advisory Committee and I proposed a rule that guarantees victims the right to attend court proceedings except in those very rare instances where the victim's testimony would be

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[516] See Attorney General Guidelines, supra note 161, at 23.

[517] See, e.g., Ala. Code. § 15-23-62 (LexisNexis 1995) (requiring law enforcement officers to give victims initial description of their rights and "the name and telephone number of the office of the prosecuting attorney to contact for further information").

[518] See Pub. L. No. 108-405, ***118 Stat. 2260, 2264-65 (2004);*** see also 150 Cong. Rec. S4267 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) ("We authorized an appropriation of to assure … that moneys would be made available to enhance the victim notification system, managed by the Department of Justice's Office for Victims of Crime, and the resources additionally to develop state-of-the-art systems for notifying crime victims of important states of development.") (emphasis added).

[519] Cassell, Proposed ***Amendments***, supra note 4, at 904-05. I proposed adding this as new Rule 43.1, but discuss it here as new Rule 60(a)(1) to track the Advisory Committee's nomenclature.

[520] Proposed ***Amendments***, supra note 71.

[521] See Wright, supra note 210, § 721, at 13.

[522] 150 Cong. Rec. S10910-01 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (reprinted in Appendix B).

materially altered by attending the trial. [523] Because the Advisory Committee proposal essentially tracks my proposal, it is not necessary to discuss this issue here.

(New) Rule 60(a)(3) - Victims' Right to be Heard on Bail, Plea, Sentencing and Other Issues The Proposals:

I proposed not only specific rules allowing victim to be heard at release, plea, and sentencing hearings but also a general rule giving victims the right to be heard on all issues directly affecting their rights as follows:

Right to be Heard on Victims' Issues. In addition to rights to be heard established elsewhere in these rules, at any public proceeding at which a victim has the right to attend, the victim has the right to be heard on any matter directly affecting a victim's right. [524]

The Advisory Committee proposed only a narrow rule giving victims the right to be heard at only three specific points in the process - bail, plea, and sentencing hearings:

Right to Be Heard. The court must permit a victim to be reasonably heard at any public proceeding in the district court concerning release, plea, or sentencing involving the crime. [525]

[*956] Discussion:

The Advisory Committee's proposed general rule on the victim's right to be heard is inferior to weaving that right into the specific rules on release, plea, and sentencing. This issue is discussed earlier in this Article. [526] The larger issue to pursue here is the silence of the Advisory Committee on how a court should proceed when a victim's rights under the ***CVRA*** are at stake in other proceedings. For example, what if the court is considering continuing a trial in violation of a victim's right to "proceedings free from unreasonable delay"? [527] Or excluding the victim from a proceeding in violation of a victim's right "not to be excluded from … public court proceeding"? [528] Or turning over to the defense personal and confidential information about the victim in violation of a victim's right "to be treated with fairness and with respect for the victim's dignity and privacy"? [529] Or giving a defendant the victim's home address in an alibi situation in violation of the victim's right to be "reasonably protected from the accused"? [530]

My proposed rule would state directly that the victim has the right to be heard on such issues. How the Advisory Committee would handle such issues is unclear. The Advisory Committee's proposed rule on the victim's right to be heard only confers such a right for three specific hearings. The listing of three hearings might seem to suggest victims could not be heard elsewhere. But denying victims a chance to be heard at other hearings where their rights are implicated is such an obvious violation of fundamental notions of fairness (not to mention the victim's right to fairness under the ***CVRA***) that one should be reluctant to ascribe that position to the Advisory Committee.

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[523] See Cassell, Proposed ***Amendments***, supra note 4, at 904-11; Proposed ***Amendments***, supra note 71, R. 60(a)(2), at 16; see also *In re Mikhel, 453 F.3d 1137, 1139-40 (9th Cir. 2006)* (reversing district court decision excluding victims from trial under the ***CVRA***); Beloof & Cassell, supra note 229, at 519-20 (concluding that the ***CVRA*** grants a "nearly unqualified" right for the victim to attend a trial).

[524] Cassell, Proposed ***Amendments***, supra note 4, at 905, 911.

[525] Proposed ***Amendments***, supra note 71, R. 60(a)(3), at 16.

[526] See supra notes 464-468 and accompanying text (proposing ***amendments*** to Rule 48 regarding release); supra notes 151-158 and accompanying text (proposing ***amendments*** to Rule 11 regarding pleas); supra notes 434-448 and accompanying text (proposing ***amendments*** to Rule 32).

[527] *18 U.S.C. § 3771*(a)(7) (2006).

[528] Id. § 3771(a)(3).

[529] Id. § 3771(a)(8); see also supra notes 231-351 and accompanying text (discussing ***amendments*** to Rule 17).

[530] *18 U.S.C. § 3771*(a)(1); see also supra notes 177-213 and accompanying text (discussing this question).

Part of the confusion here may stem from two different ways in which victims can be heard. The first way is when the victim's statement is effectively built into the proceeding at issue. At sentencing hearings, for example, the ***CVRA*** envisions a specific point in the process where the victim will have a chance to make a statement - the victim's allocution. [531] This is what the ***CVRA*** means when it refers to the victim's "right to be heard" at sentencing proceedings (along with plea and bail proceedings). But the listing of victims' rights to be heard at those three specific hearings could not possibly have meant that victims would have to remain silent at all other hearings.

[*957] The ***CVRA*** envisions victims being heard in second sense - in arguing in favor of their rights. The ***CVRA*** directly gives victims and their representatives the right to "assert" their rights. [532] These rights can be asserted by a victim's representative (that is, an attorney). [533] The ***CVRA*** also allows victims to file motions asserting their rights which must be taken up "forthwith." [534] These are all ways in which victims can properly be heard. [535]

The ***CVRA***'s legislative history makes it unmistakably clear that victims would be heard at other points in the process. Senator Feinstein explained that the basic goal of the ***CVRA*** was to give victims the right to "participate in the process where the information that victims and their families can provide may be material and relevant … ." [536] Senator Kyl also noted that the act's enforcement provisions would give victims rights to be heard throughout the process:

[The ***CVRA***'s enforcement provisions] allow[] a crime victim to enter the criminal trial court during proceedings involving the crime against the victim, [to stand with other counsel in the well of the court,] and assert the rights provided by this bill. This provision ensures that crime victims have standing to be heard in trial courts so that they are heard at the very moment when their rights are at stake and this, in turn, forces the criminal justice system to be responsive to a victims' rights in a timely way. [537]

As one illustration of how this right to be heard operates, consider the victim's right to proceedings free from unreasonable delay. [538] Presumably, this right encompasses a victim's opportunity to be heard before a case is delayed. As Senator Kyl stated: "This provision should be interpreted so that any decision to schedule, reschedule, or continue criminal cases should include victim input through the victim's assertion of the right to be free from unreasonable delay." [539]

In view of all the different ways in which crime victims can be heard, it is appropriate to have a rule that speaks broadly to the subject and protects victims' right to be heard whenever their rights are at stake. My proposed rule achieves that goal.

[*958] (New) Rule 60(b) - Enforcement of Victims' Rights The Proposals:

I proposed folding into the procedures a victim's right to assert an error as follows:

Rule 51. Preserving Claimed Error

(a) Exceptions Unnecessary. Exceptions to rulings or orders of the court are unnecessary.

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[531] See supra notes 434-448 and accompanying text (discussing victim allocution).

[532] *18 U.S.C. § 3771*(d)(1).

[533] Id.

[534] Id. § 3771(d)(3).

[535] See, e.g., United States v. Tobin, No. 04-CR-216-01-SM, 2005 WL 1868682, at 2 (D.N.H. July 22, 2005) (allowing putative victim to assert right to proceedings free from unreasonable delay even though bail, plea, or sentencing hearing not at issue).

[536] 150 Cong. Rec. S4262 (Apr. 22, 2004) (statement of Sen. Feinstein).

[537] 150 Cong. Rec. S4269 (Apr. 22, 2004) (statement of Sen. Feinstein) (emphases added).

[538] *18 U.S.C. § 3771*(a)(7).

[539] 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (emphasis added) (reprinted in Appendix B).

(b) Preserving a Claim of Error. A party or a victim may preserve a claim of error by informing the court - when the court ruling or order is made or sought - of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party or a victim does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by *Federal Rule of Evidence 103*. [540]

The Advisory Committee proposed incorporating some of the language of the ***CVRA*** dealing with enforcement of victims' rights as follows:

Rule 60. Victim's Rights.

… .

(b) Enforcement and Limitations.

(1) Time for Decision. The court must promptly decide any motion asserting a victim's rights under these rules.

(2) Who May Assert Rights. The rights of a victim under these rules may be asserted by the victim or the attorney for the government.

(3) Multiple Victims. If the court finds that the number of victims makes it impracticable to accord all of the victims the rights described in subsection (a), the court must fashion a reasonable procedure to give effect to these rights that does not unduly complicate or prolong the proceedings.

(4) Where Rights may be Asserted. The rights described in subsection (a) must be asserted in the district in which a defendant is being prosecuted for the crime.

(5) Limitations on Relief. A victim may make a motion to re-open a plea or sentence only if:

(A) the victim has asked to be heard before or during the proceeding at issue and the request was denied;

[*959] (B) the victim petitions the court of appeals for a writ of mandamus within 10 days of the denial and the writ is granted; and

(C) in the case of a plea, the accused has not pleaded to the highest offense charged.

(6) No New Trial. In no case is a failure to afford a victim any right under these rules grounds for a new trial. [541]

Discussion:

I proposed to essentially create a rule for victims to assert error, leaving additional details to be treated elsewhere. The Advisory Committee proposed to fold into the Rules of Criminal Procedure some of the enforcement provisions and restrictions in the ***CVRA***.

Because the Advisory Committee's proposal largely tracks the ***CVRA***, much in it is unobjectionable. But the Advisory Committee deviates from the ***CVRA***'s language in five places for reasons that are unexplained - and unexplainable. The patient reader of this Article may not be surprised that all five of these deviations operate in the same direction - to reduce a crime victim's rights from what Congress has commanded.

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[540] Cassell, Proposed ***Amendments***, supra note 4, at 921-22.

[541] Proposed ***Amendments***, supra note 71, R. 60(b), at 16-18.

First, in Proposed Rule 60(b)(1), the Advisory Committee has watered down the ***CVRA***'s directive that a court must decide any victim's motion "forthwith" [542] to "promptly." While there is nothing wrong with this change as a matter of style, [543] it does appear to reduce the speed with which courts will have to act to enforce victims' rights. "Forthwith" can be interpreted to be more exacting requirement than "promptly." [544] Given that the Advisory Committee's premise that, where possible, it "should incorporate" the language of the ***CVRA***, [545] it is unclear why it chose to substitute "promptly" for the "forthwith" requirement.

Second, in Proposed Rule 60(b)(2), the Advisory Committee has inexplicably left out the right of the victim's representative to assert a victim's right (along with **[*960]** the victim herself and the prosecutor). [546] This omission is criticized earlier in this Article. [547]

Third, in Proposed Rule 60(b)(5)(a) through (c), the Advisory Committee sets out three requirements for a victim to file a motion to reopen a sentence - requirements taken straight from the ***CVRA***. [548] Without explanation, however, the Advisory Committee then leaves out the ***CVRA***'s qualification to these restrictions - "this paragraph does not affect the victim's right to restitution as provided in Title 18, United States Code." [549]

Fourth, in Proposed Rule 60(b)(4), the Advisory Committee has left out the ***CVRA***'s venue provision which allows a victim to assert her rights "if no prosecution is underway, in the district court in the district in which the crime occurred." [550] In contrast to the other three omissions just noted, the Advisory Committee specifically discussed whether to track the italicized language in its proposed rule on asserting rights. Remarkably, it decided to take the statutory language out of the Rules:

Judge Levi expressed concern over the final phrase in Rule [60(b)(4)], which gives a victim the right to assert rights "if no prosecution is underway, in the court in the district in which the crime occurred." Judge Jones said the Crime Victims Rights Act affords victims certain rights even in the absence of a case. Judge Levi noted, however, that the criminal rules only apply to proceedings in filed cases. Judge Jones explained that the subcommittee had decided to include it because there might be a pre-prosecution proceeding of some sort to which the provision might apply. There was discussion as to whether a grand jury investigation might qualify as such. Professor Beale said that, while the Act might give victims certain rights, such as being treated respectfully, Judge Levi was probably correct that the rights covered by the criminal rules could only be asserted with respect to a case being prosecuted. After further discussion, Judge Jones said the phrase would be deleted, as Judge Levi had suggested. [551]

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[542] *18 U.S.C. § 3771*(d)(3).

[543] See Bryan A. Garner, A Dictionary of Modern Legal Usage 372 (2d ed. 1995).

[544] See, e.g., ***Amella v. United States, 732 F.2d 711, 713 (9th Cir. 1984)*** "["Forthwith'] connotes action which is immediate, without delay, prompt, and with reasonable dispatch."); *Ayers v. Coughlin, 530 N.E.2d 373, 375 (N.Y. 1988)* ("We reiterate that the statutory mandate to commit individuals to the officials responsible for their custody "forthwith' means that it is done without delay, at once, promptly. "Forthwith' signals immediacy.").

[545] ***CVRA*** Subcommittee Memo, supra note 66, at 1-2.

[546] Compare Proposed ***Amendments***, supra note 71, R. 60(b)(2), at 17, with *18 U.S.C. § 3771*(d)(1) (2006) (victims' rights may be asserted by "the crime victim or the crime victim's lawful representative, and the attorney for the Government") (emphasis added).

[547] See supra notes 117-133 and accompanying text. For the Advisory Committee's response to this criticism, see infra notes 578-579 and accompanying text.

[548] See *18 U.S.C. § 3771*(d)(5)(a)-(c).

[549] Id. § 3771(d)(5).

[550] Id. § 3771(d)(3) (emphasis added).

[551] Advisory Committee Minutes, supra note 68, at 15 (discussing now-renumbered Rule 43(1)(b)(3)).

This resulted in the Advisory Committee proposing a rule that recites only half of the ***CVRA***'s venue provision. The rule as proposed by the Advisory Committee provides that "the rights described in [the rules] must be asserted in **[*961]** the district in which a defendant is being prosecuted for the crime," [552] leaving silent what a victim should do if no prosecution is underway.

Once again, the confusion that the Advisory Committee discovered in the statute stems from the committee's failure to give effect to (among other things) the victim's right to fairness. The ***CVRA*** extends the requirement for fair treatment not only to prosecutors and courts, but also to all "officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime … ." [553] (I will call this the ***CVRA***'s "coverage provision.") It is, of course, easily conceivable that investigative agencies might violate a victim's right to fairness before formal criminal proceedings were initiated. Because "no prosecution is underway" in such circumstances, the victim would need to assert their rights (in the language of the ***CVRA***'s venue provision) "in the district court in the district in which the crime occurred."

Under the Advisory Committee's proposal, a victim who is treated unfairly by a federal investigative agency will lack any place to assert her right to fair treatment - in contravention of a teaching that traces back at least to Marbury v. Madison that "where there is a legal right, there is also a legal remedy." [554] The Advisory Committee, however, seems to think that this is not a problem to be addressed in the Rules because the rights covered by the criminal rules "could only be asserted with respect to a case being prosecuted." But, of course, this assumption depends on limiting the rights in the ***CVRA*** to such narrow provisions as the right to be "heard" on sentencing and other issues, because these rights attach only to "any public proceeding." [555] This assumption fails if the right to be treated fairly (not to mention the right to be treated with dignity and respect and other rights) is in the mix - as ***CVRA***'s plain language demands.

The Advisory Committee seemed to recognize the venue problem for cases with no prosecution underway when it discussed the fact that victims may now have rights in the grand jury process (a subject squarely covered by the criminal rules [556]). But other examples exist as well. For example, federal agents may improperly tread on a victim's rights through a search warrant (another subject covered by the criminal rules [557]). Or in the course of their investigation, they may mishandle evidence in a way that treads on a victim's dignity (improperly disseminating a nude or pornographic photograph of a victim, for instance. [558]) In **[*962]** all these situations, victims are at least entitled to a forum to assert their rights to be treated with fairness and with respect for their dignity and privacy - yet the Advisory Committee has excised the ***CVRA***'s venue provision that provides the forum.

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[552] Proposed ***Amendments***, supra note 71, Rule 60(b)(4), at 17.

[553] *18 U.S.C. § 3771*(c)(1) (emphasis added).

[554] *5 U.S. (1 Cranch) 137, 163 (1803).*

[555] *18 U.S.C. § 3771*(a)(4).

[556] *Fed. R. Crim. P. 6*. See generally Beloof, Cassell & Twist, supra note 6, at 335-79 (discussing victims' rights and the grand jury process).

[557] See *Fed. R. Crim. P. 41*.

[558] Cf. Donohue v. Hoey, No. 02-1405, 2004 WL 2095661, at 22-24 (10th Cir. Sept. 21, 2004) (finding no § 1983 right to damages for alleged mishandling of nude photograph during state police investigation).

The examples given in the text are just illustrations, and there may be many more situations where a victim's rights might be violated before charges are filed. In particular, the victim might not receive notice of their rights before charges are filed. The Justice Department's own guidelines provide that a victim must receive notice of rights "at the earliest opportunity after detection of a crime at which it may be done without interfering with an investigation." *Dep't of Justice, Attorney General Guidelines, supra* note 161, at 23. Moreover, existing federal law requires the same notification, although this law is found outside the ***CVRA***. See *42 U.S.C. § 10607* (notice to victim must be given at "the earliest opportunity after the detection of a crime at which it may be done without interfering with an investigation.").

It is important to emphasize one argument the Advisory Committee does not appear to make: that the ***CVRA*** applies only to charged crimes. Any such argument would not only fly squarely in the face of the ***CVRA***'s venue and coverage provisions applying victims' rights against investigating agencies, but also of the ***CVRA***'s clear legislative history. Discussing the ***CVRA***'s definition of a crime victim, [559] Senator Kyl said the statute used an "intentionally broad definition because all victims of crime deserve to have their rights protected, whether or not they are the victim of the count charged." [560]

At least one federal magistrate judge has suggested, in dicta, that - in spite of Senator Kyl's plain statement - the ***CVRA*** might not apply until charges have been filed. [561] His primary reason for doing so, however, was that the Supreme Court's decision in Hughey v. United States, [562] suggested this result. To be sure, the victims statute at issue in Hughey (the Victim Witness Protection Act) did employ a similar definition of "victim" as that found in the ***CVRA***. But Hughey turned on the fact that other language in the restitution statute provided that ""a defendant convicted of an offense' may be ordered to "make restitution to any victim of such offense.'" [563] Such a straightforward holding says little about a statute - such as the "fairness" provision in the ***CVRA*** - that contains no such limiting language regarding persons "convicted … of [an] offense." Moreover, the magistrate judge did not discuss the ***CVRA***'s coverage and venue provisions, which plainly dictate that the ***CVRA*** applies to crimes not yet charged. For all these reasons, the **[*963]** Advisory Committee should apply the ***CVRA*** as written and include a venue provision both for prosecuted and not-yet-prosecuted crimes.

Fifth, and most important, in proposed Rule 60(b)(2), the Advisory Committee gives victims the power to assert rights "under these rules." As has been noted throughout this Article, the Rules as they would be amended by the Advisory Committee leave out many of the victims' rights under the ***CVRA***. For example, the victims right to a speedy trial has not been included in the proposed rule changes. [564] By giving victims the power to only assert the limited number of rights listed "under these rules," the Advisory Committee ignores many victims' rights under the ***CVRA***. At the very least, the language should be changed to make clear that victims to assert all rights that they have under the ***CVRA***.

One change that the Advisory Committee should not make is worth brief mention: The Advisory Committee should not add a provision for a fact-finding hearing to determine whether someone is a "victim" of crime. In its comment on the pending proposed ***amendments***, the National Association of Criminal Defense Lawyers ("NACDL") has proposed such a procedure. The rationale it gives is that "the conferring of "rights' on the "victim' comes, in general, at the expense of the defendant. Thus, due process requires that a provision be added to these Rules for a factfinding hearing, to be held whenever the proper labeling of a person as "victim,' is in dispute … ." [565]

The NACDL's rationale is patently defective. The rights in the ***CVRA*** do not interfere with any rights of the defendant, as pointed out throughout this Article. [566] For instance, for victims to be notified of court hearings, to attend those hearings, and

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[559] See supra notes 117-133 and accompanying text (discussing ***amendments*** to Rule 1).

[560] 150 Cong. Rec. S10912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl); cf. *United States v. Heaton, 458 F. Supp. 2d 1271, 1272 (D. Utah 2006)* ("Although some of the other rights in the Crime Victims' Rights Act (such as the right to be heard and the right to not be excluded) are limited to "public proceedings,' the right to fairness is not so restricted.").

[561] *United States v. Turner, 367 F. Supp. 2d 319, 326-27 (E.D.N.Y. 2005).*

[562] *495 U.S. 411 (1990).*

[563] *Id. at 415-16* (emphases added) (quoting 18 U.S.C. § 3579(a)(1) (1982 ed. Supp. IV)).

[564] See supra notes 483-493 and accompanying text.

[565] Peter Goldberger, Statement on Behalf of the Nat'l Assoc. of Crim. Defense Lawyers Before the Advisory Comm. on Criminal Rules 4 (Jan. 26, 2007).

[566] While the ***CVRA*** extends to uncharged crimes, it is also obvious that "the ***CVRA*** does not grant victims any rights against individuals who have not been convicted of a crime." *In re W.R. Huff Asset Mgmt. Co., 409 F.3d 555, 564 (2d Cir. 2005)* (emphasis added); accord Searcy v. Skinner, No. 6:06-1418-GRA-WMC, 2006 WL 1677177, at 2 (D.S.C. June 16, 2006). Like the constitutional ***amendment*** it was patterned on, the ***CVRA*** extends rights against the government - that is, rights "not to be victimized again through the process by which government

to speak at those hearings does not interfere with the defendant's right to be notified of those hearings, attend those hearings, and to speak at those hearings. Perhaps this is why the NACDL could only assert that "in general" victims' rights harm defendants - the NACDL did not provide a single supporting example.

Moreover, the procedure that the NACDL would put in place - a full evidentiary hearing with the defendant able to cross-examine the victim to be determine "victim" status - is novel and unwarranted. While crime victims' rights have existed in all fifty states and the federal system for the last two decades, no **[*964]** jurisdiction has ever required anything like this. [567] Instead, procedural issues of how to determine victim status are left to the sound discretion of the trial courts.

To give a defendant an automatic right to challenge victim status raises constitutional and other problems. A defendant who simply complained about a victim designation would lack "standing" under Article III of the Constitution, because there would be no "threatened or actual injury resulting from the putatively illegal action." [568] Moreover, to give defendants free license to cross-examine victims about whether they were truly victims would obviously create a right to discovery in a criminal case that contradicts current law [569] and circumvents the stringent limitations on depositions of witnesses found in Rule 15. [570] The potential for abusive questioning of victims in such hearings (where no jury is present to be alienated) should also not be overlooked. [571] The victims' rights provisions in this country have never been used to give defendants new rights to question and potentially traumatize victims. The ***CVRA***'s expansion of victims' rights should not be the occasion to start. [572]

V. Conclusion

This Article has tried to make the case for specific changes to the Federal Rules of Criminal Procedure to protect crime victims' rights, particularly those rights listed in the ***CVRA***. The Article has attempted to sketch out one way that the Rules could be amended to do this while at the same time contending that the Advisory Committee's pending victims' rights proposals are too restrictive. In concluding the Article, it may be useful to raise broader concerns about the Advisory Committee's minimalist approach.

In reviewing the Advisory Committee's proposals, some might reach the conclusion that the Committee treated the victims issue as a chore to be survived rather than an opportunity to be seized. One can read the Committee's proposals and the minutes of its discussions without finding much enthusiasm for the idea of crime victims becoming a part of the criminal justice process. This reluctance may be part of a larger phenomenon of hostility by the legal culture to crime victims, as other scholars and I have argued elsewhere. [573]

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officials prosecute, punish and release accused or convicted offenders." Tribe & Cassell, supra note 28; accord S. Rep. 106-254, at 1-2 (2000) (Victims' Rights ***Amendment*** designed to guarantee victims participatory rights in government process). That is why the ***CVRA*** states that the rights must be afforded by government agencies and actors. See *18 U.S.C. § 3771*(c)(1) (2006).

[567] Communication from Professor Douglas Beloof, Director of the National Crime Victims Law Institute (Jan. 19, 2007) (on file with author).

[568] *Warth v. Seldin, 422 U.S. 490, 499 (1975)* (internal quotation omitted).

[569] See supra notes 206-211 and accompanying text.

[570] See supra note 210 and accompanying text.

[571] See Cassell, Proposed ***Amendments***, supra note 4, at 1434-37 (explaining how cross-examination of victims at Utah's preliminary hearings has traumatized victims).

[572] The Advisory Committee ultimately agreed with this position, and added language to a Committee Note stating simply that the court could make findings to resolve any dispute about who was a victim. See infra note 580.

[573] See, e.g., Cassell, Proposed ***Amendments***, supra note 4, at 534 ("The "legal culture' … is one that has not made room for crime victims."); Edna Erez, Victim Participation in Sentencing: And the Debate Goes On … , 3 Int'l Rev. of Victimology 17, 29 (1994) (noting socialization of legal scholars "in a culture and structure that do not recognize the victim as a legitimate party in criminal proceedings"); see also Stephanos Bibas, Transparency and Participation in Criminal Procedure, *81 N.Y.U. L. Rev. 911, 964 (2006)* (suggesting crime victims can effectively monitor the behavior of "insiders" in the system).

[*965] Any lack of interest in crime victims is regrettable and might lead to harmful consequences. Congress has decided that crime victims must be fully integrated into the federal criminal justice system. The Rules of Criminal Procedure are an important part of that system and must fully reflect the congressionally protected interests of crime victims. If the judiciary will not do the job, no doubt Congress will step in to finish the task. Indeed, Congress will be looking carefully at the ***CVRA***'s effectiveness in changing the system in 2008, as it directed the General Accounting Office to "prepare and submit to the appropriate committees a report" on the effectiveness of the act at that time. [574]

It would be unfortunate if initiative for rules on crime victims were to pass from the courts to Congress. The courts do have institutional advantages in assessing changes in the Rules. [575] The rulemaking committees are staffed with judges who have long experience in applying rules of procedure. And the rulemaking process itself guarantees considerable public involvement and careful deliberation about any rules that are ultimately adopted.

But having a good rulemaking process is one thing; producing a good product is another. Unfortunately, the Advisory Committee's current proposals do not treat crime victims fairly and, even more indisputably, do not fully implement Congress's commands in the ***CVRA***. As the ***CVRA*** directs, crime victims are now participants in the federal criminal justice system. The Federal Rules of Criminal Procedure must faithfully reflect that new reality and ensure that crime victims, no less than prosecutors and defendants, are treated fairly throughout the process.

VI. Afterword

After this Article was completed in January 2007, several significant developments occurred that are relevant to rule changes discussed here. First, several members of Congress wrote the Advisory Committee to explain that they were concerned about the timid approach to implementing the ***CVRA***. Then, in the spring and summer of 2007, the Advisory Committee itself made several changes to the Rules discussed in this Article. Finally, as anticipated in the conclusion to this Article, Congress has begun to move on legislation that would finish the task of enshrining crime victims' rights in the federal rules. Rather than revise the Article in light of these subsequent developments, it seemed to make more sense to let the Article stand as originally written and supplement it with a brief afterward discussing each of these developments.

[*966]

A. Congressional Public Comment on the Advisory Committee's Proposed Rules

Public comment on the Advisory Committee's proposed rule changes closed in February 2007. As comment was closing, several members of Congress wrote the Committee, confirming that they too are troubled by the minimalist approach to the proposed ***CVRA amendments***. On February 15, 2007, Senator Jon Kyl wrote to the Committee to express his "strong concern" about the proposed ***amendments***. He explained as follows:

As a sponsor of the Act, I believe that passage by overwhelming majorities in both the House and the Senate signifies Congress's intent to provide crime victims with substantive rights and protections in federal court. But the proposed ***amendments*** do little more than reiterate limited parts of the statute. Crime victims have been mistreated by the federal criminal justice system for far too long. To comply with Congress's intent, the Advisory Committee must take decisive and … comprehensive action to thoroughly amend the rules and fully ensure that crime victims are protected in federal courts. [576]

Senator Kyl went on to say he "fully endorsed" my specific proposals, indicating that they were, however, in some areas "too cautious." [577]

B. The Advisory Committee's Response to this Article and Other Public Comments

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[574] Pub. L. No. 108-405, § 104(b)(2), ***118 Stat. 2260, 2265*** (codified as amended at *18 U.S.C. § 3771* (Supp. 2006)).

[575] See generally Peter G. McCabe, Renewal of the Federal Rulemaking Process, *44 Am. U. L. Rev. 1655,1687-91 (1995).*

[576] Letter from Senator Jon Kyl to Hon. David F. Levi, Chairman, Comm. on Rules of Practice and Procedure 1 (Feb. 16, 2007).

[577] Id. at 3.

In response to this Article and to other public criticisms of its rules, the Advisory Committee made several modest changes to its proposed rules. These changes are discussed in numerical order here. Other than these changes, no significant changes were made to the proposed rules discussed here. The Advisory Committee has submitted them all to the Supreme Court and, unless the Court takes the unusual step of disavowing them, they will go into effect on December 1, 2008.

Rule 1. In apparent response to my criticism that the definition of "victim" found in Rule 1 intentionally excluded a victim's "representative," [578] on April 16, 2007, the Advisory Committee amended its proposed Rule 60 to allow a victim's representative to assert a right. Rule 60(b)(2) now provides: "A victim's rights described in these rules may be asserted by the victim, the victim's lawful representative, the attorney for the government, or any other person as authorized **[*967]** by *18 U.S.C. § 3771*(d) and (e)." [579] This change insures that victims' representatives will be able to assert victims' rights. The Advisory Committee also added language to the Committee Note stating that courts could make appropriate findings to resolve any dispute about who is a victim. [580]

Rule 5. At its October 1, 2007 meeting in Utah, the Advisory Committee approved a proposed change to Rule 5 regarding detention hearings. The proposed addition to Rule 5 reads: "In making the decision to detain or release the defendant, the judge must consider the right of the victim to be reasonably protected from the defendant." [581] This language was lifted almost straight from Senator Kyl's proposed legislation implementing the ***CVRA*** [582] (which is discussed in the next section). This seems like a valuable addition to the Rules, helping to protect victims' rights in detention decisions.

Rule 12.1. At its April 16, 2007 meeting, the Advisory Committee apparently agreed with my conclusion that courts lack authority to force a victim to meet with a defendant [583] and struck language recommending such a meeting from its Committee note. [584]

Rule 12.3. Also at its October 1, 2007 meeting, the Advisory Committee responded to my point that the same language appears in both Rule 12.1 (alibi defense) and Rule 12.3 (public authority defense) regarding disclosure of addresses of crime victims. [585] It therefore proposed to add the same changes to Rule 12.3 that it added to Rule 12.1. [586] Unfortunately, for the reasons discussed at length here, now the language in both Rule 12.1 and 12.3 is insufficiently protective of victims' rights. [587]

Rule 17. At its April 16, 2007 meeting, the Advisory Committee revised its rule on subpoenas for confidential information to read: "Before entering the order and unless there are exceptional circumstances, the court must require that notice be given to the victim so that the victim can move to quash or modify the subpoena or otherwise object." [588] This change responds to objections from the American Bar Association, other groups, and me that the earlier rule encouraged ex parte **[*968]** issuance

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[578] See supra notes 117-126 and accompanying text.

[579] Proposed ***Amendments***, supra note 71, R. 60(b)(2), at 17 (emphasis added).

[580] Memorandum from Hon. Susan C. Bucklew, Chair, Advisory Comm. on Fed. Rules of Criminal Procedure, to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure app. a, at 271-72 (May 19, 2007) [hereinafter Bucklew Memo], available at *http://www.uscourts.gov/rules/Reports/CR05-2007.pdf*.

[581] Memorandum from Professor Sara Sun Beale, Reporter, Advisory Comm. on Fed. Rules of Criminal Procedure, to Members of the Criminal Rules Advisory Comm. 136 (Sept. 2, 2007) [hereinafter Beale Memo].

[582] S. 1749, 110th Cong. § 5 (2007).

[583] See supra notes 206-211 and accompanying text.

[584] Bucklew Memo, supra note 580, app. a, at 277.

[585] See supra notes 202-203 and accompanying text.

[586] Beale Memo, supra note 581, app. at 7.

[587] See supra notes 187-191 and accompanying text (explaining why changes to Rule 12.1 leave victims' addresses vulnerable to unfair disclosure).

[588] Bucklew Memo, supra note 580, app. a, at 283.

of subpoenas for confidential information and thus violated important due process principles. [589] The new rule is an improvement, in that it limits ex parte procedures to "exceptional circumstances." The Committee note then offers two illustrations of exceptional circumstances. One is unobjectionable - where "evidence … might be lost or destroyed if the subpoena were delayed" [590] - a standard exigent circumstance that justifies moving rapidly. But the other illustration - "a situation where the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy" [591] - remains quite problematic, for reasons discussed earlier. [592]

Rule 21. Also at its October 1, 2007 meeting, the Advisory Committee approved a very modest change to Rule 21(b), regarding transfer of cases for convenience. The change reads:

Rule 21. Transfer for Trial

… .

(b) For Convenience. Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties, and victim, and the witnesses, and in the interests of justice.

This change is modest, because (in my estimation) relatively few federal cases involving victims are transferred for "convenience" under Rule 21(b). The more common situation is transfers for prejudice under Rule 21(a). [593] Thus, this change is, at best, relatively inconsequential.

In any event, the change is defective. While the proposed rule lets the judge consider the victim's interest in determining whether to transfer, the Advisory Committee did not adopt my recommendation to let crime victims be heard on transfer decisions. [594] Without a mechanism for passing victim information along to the judge, an instruction to the judge to consider the victims' interest is essentially meaningless. The Advisory Committee should remedy this defect by giving victims the right to be heard on transfer decisions.

Rule 32. In possible response to my point that victims deserve the right to be "heard" at sentencing hearings by speaking directly to the judge, [595] on April 16, 2007, the Advisory Committee modified its note to Rule 32(i)(4). The note now reads: "Absent unusual circumstances, any victim who is present should be **[*969]** allowed a reasonable opportunity to speak directly to the judge." [596] While this is an improvement over earlier language, it still remains unclear what sorts of "unusual circumstances" the Advisory Committee has in mind that would permit a judge to deny a victim her right under the ***CVRA*** to speak. It is also odd that the Advisory Committee Note would apparently allow a judge to exclude a victim in some circumstances, when the only two reported decisions on the issue have held directly to the contrary that victims have an unequivocal right to speak to the judge. [597]

Rule 60. In response to public comments, the Advisory Committee made several modest changes to Rule 60. Rule 60(a)(2) was revised to make clear that the duty to permit full attendance arises in the context of the victim's possible exclusion. [598] As

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[589] See supra notes 347-351 and accompanying text.

[590] Bucklew Memo, supra note 580, app. a, at 282.

[591] Id.

[592] See supra notes 249-257 and accompanying text.

[593] See, e.g., supra notes 366-382 and accompanying text (discussing transfer for prejudice in two cases).

[594] See supra note 366 and accompanying text.

[595] See supra notes 434-448 and accompanying text.

[596] Beale Memo, supra note 580, app. at 7.

[597] See *Kenna v. U. S. Court for Cent. Dist. of Cal., 435 F.3d 1011, 1016 (9th Cir. 2006); United States v. Degenhardt, 405 F. Supp. 1341, 1343-44 (D. Utah 2005);* see also *United States v. Turner, 367 F. Supp. 2d 319, 333 (E.D.N.Y. 2005)* (reaching same conclusion).

[598] Bucklew Memo, supra note 580, app. a, at 299, 302-03.

discussed in connection with Rule 1 above, [599] Rule 60(b)(2) was revised to make clear that a victim's "representative" could assert a victim's right.

C. The Last Word? Legislation to Fully Implement the ***CVRA***

Unsatisfied with the timid approach taken by the Advisory Committee on the ***CVRA***, Senator Jon Kyl introduced legislation to comprehensively amend the federal rules on June 29, 2007. Senator Kyl explained that the Advisory Committee's ***amendments*** "do little more than reiterate limited parts of the statute." [600] Agreeing with the major premise of this Article - that crime victims must be treated fairly in the criminal justice process - Senator Kyl noted: "Of particular importance, the ***CVRA*** guaranteed that crime victims would have the right to be treated with "fairness.' My proposed ***amendments*** would add to the Federal rules the changes needed to treat crime victims fairly." [601] Senator Kyl was also concerned about delay by the Advisory Committee in moving forward with comprehensive ***amendments***:

Congress enacted the ***CVRA*** in October 2004. In the almost 3 years since then, I have waited patiently to give the federal courts the first opportunity to review the need for rule changes. At the same time, though, I have made clear my position, as one of the cosponsors of the ***CVRA***, that Congress expected significant reforms in the Federal rules. As I explained to my colleagues at that time, the crime victims' **[*970]** community in this country was looking to the ***CVRA*** to serve as a model for the states and a formula to fully protect crime victims. [602]

Accordingly, Senator Kyl proposed a long string of direct ***amendments*** to the Federal Rules of Criminal Procedure to comprehensively protect victims' rights.

Some of the legislation that Senator Kyl proposed tracked my proposals in this Article. For example, he proposed ***amendments*** to a number of rules - including Rules 2, 10.1, [603] 11(b)(4), 11(c)(1), 11(c)(2), 12.1, 12.3, 15, 21(e), 32(f)(1), 32(h), 43.1, 44, 46, and 50(c) - largely tracking my proposals.

But other proposed changes went well beyond those I propose here. For example, Senator Kyl proposed changing Rule 4's provision dealing with execution of arrest warrants to require reasonable efforts to give notice to victims about the initial appearance of an arrested suspect. [604] Along the same lines, Senator Kyl would give victims reasonable notice of any decision to release a defendant at the initial appearance [605] as well as notice of any pretrial conference. [606] He also would give federal prosecutors authority to release to a victim any discovery materials that have been released to the defendant. [607] To assist non-English speaking crime victims, he proposes to give the courts authority to appoint an interpreter for the victim. [608] Senator Kyl's bill would also require disclosure to the victim of any presentence report "except any portion of such report excised by the court for compelling reasons or made confidential by law." [609] And his bill would require that the victim be given a reasonable opportunity to be heard before any motion for a new trial is granted. [610]

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[599] See supra notes 117-126 and accompanying text.

[600] 153 Cong. Rec., S8746 (daily ed. June 29, 2007) (statement of Sen. Jon Kyl).

[601] Id.

[602] Id. at S8747.

[603] My proposed Rule 10.1 regarding notice to crime victims (which Senator Kyl largely tracked) is discussed in this Article as Rule 60(a)(1). See supra notes 505-519 and accompanying text.

[604] S. 1749, 110th Cong. § 4 (2007).

[605] Id. § 5.

[606] Id. § 15.

[607] Id. § 13.

[608] Id. § 18.

[609] Id. § 19.

[610] Id. § 21.

As of this writing, the ultimate disposition of Senator Kyl's bill remains uncertain. But what is certain is that congressional interest in crime victims' rights will remain strong. Congress has been working on far reaching crime victims' rights legislation for several decades now and, indeed, many in Congress favor an ***amendment*** to the United States Constitution to protect victims' rights. [611] Against that backdrop, it is unlikely that Congress will permit the Federal Rules of Criminal Procedure to only haphazardly protect victims' rights. If the Advisory Committee does not complete the task of comprehensively reforming the Rules to protect victims, Congress almost certainly will - and should - finish the job.

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[611] See supra notes 30-35 and accompanying text.

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DAVID SCHOEN

ARTICLE: Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act

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Text

[*837]

I. Introduction

Crime victims are virtually absent from the Federal Rules of Criminal Procedure. The sixty federal rules comprehensively cover every aspect of federal criminal proceedings - from initial appearance through preliminary hearing, arraignment, acceptance of pleas, trial, and sentencing. Yet the rules substantively mention victims only once, briefly recognizing the right of some victims to speak at sentencing. [1]

The federal rules can no longer leave victims unmentioned. In October 2004, Congress passed and President Bush signed into law the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act (***CVRA***). [2] The ***CVRA*** transforms crime victims into participants in the criminal justice process by (among other things) guaranteeing them notice of court hearings, the right to attend those hearings, and the opportunity to testify at appropriate points in the process. These new victims' rights will reshape the federal criminal justice system and force significant changes to the Federal Rules of Criminal Procedure to reflect the victim's expanded role. This Article offers comprehensive proposals for changing the federal rules to both implement the ***CVRA*** and reflect sound public policy. The ***CVRA*** dictates changes like these to the Federal Rules of Criminal Procedure because only by integrating victims into the federal rules will Congress's goal of making victims participants in the process be fully realized.

This Article is divided into five parts. Following this introduction, Part II reviews the current absence of victims from the federal rules. Surprisingly, even where the rules cover issues of great concern to victims, victims somehow go unmentioned.

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[1] See *Fed. R. Crim. P. 32(i)(4)(B)*; discussion infra note 3 and accompanying text.

[2] Crime Victims' Rights Act, Pub. L. No. 108-405, ***118 Stat. 2261 (2004)*** (codified at *18 U.S.C.A. 3771* (West 2004 & Supp. 2005)). The ***CVRA*** was part of a much larger piece of legislation that addressed a variety of subjects, known as the "Justice for All Act." See generally Steven J. Twist, On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, Nila Lynn Crime Victims' Rights Act, 9 Lewis & Clark L. Rev. (forthcoming 2005).

Part II then discusses the crime victims' rights movement and concludes with a brief sketch of the events leading to the ***CVRA***'s enactment.

[*838] Part III discusses why it is necessary to amend the federal criminal rules to incorporate victims. Although the ***CVRA*** is a federal statute that automatically trumps any conflicting procedural rule, procedural rules drive day-to-day courtroom practices. Given that Congress was particularly concerned about integrating victims into the fabric of the criminal justice system, the Advisory Committee on Criminal Rules should amend the rules to directly reflect the ***CVRA***'s requirements.

Part IV provides a rule-by-rule analysis of the changes needed in the Federal Rules of Criminal Procedure to implement the ***CVRA***. Of particular importance is new language protecting crime victims' rights to be notified of and to be present and heard at public criminal proceedings. Congress should also implement the right to notice in a new rule mandating that prosecutors keep victims apprised of criminal proceedings. In addition, the rules should also reflect victims' rights to attend court proceedings and to testify at bail, plea, and sentencing hearings. Part IV also discusses other significant changes needed to conform the rules to the ***CVRA***: defining "victim," giving victims notice before confidential information is subpoenaed, allowing victims to be heard before cases are transferred to remote districts, giving victims access to relevant parts of the pre-sentence report, permitting courts to appoint counsel for victims, and protecting the victim's right to proceedings free from unreasonable delay. Part V contains a brief conclusion.

II. The Missing Victims of Crimes

Crime victims are absent from the Federal Rules of Criminal Procedure. Yet this is not because victims lack vital interests in criminal cases. As the ***CVRA*** recognizes, victims have vital concerns throughout the criminal process. This section recounts the absence of victims from the federal criminal rules, then contrasts that absence with the aims of the victims' rights movement. The movement has argued successfully before state legislatures and Congress for the recognition of crime victims' rights - with these efforts culminating in the passage of the ***CVRA***, protecting crime victims' rights in the federal system.

[*839]

A. The Victim's Absence from the Current Federal Criminal Rules

The sixty Federal Rules of Criminal Procedure provide the architecture for the entire federal criminal court process, including initial appearance, preliminary hearing, arraignment, acceptance of pleas, trial, and sentencing. One would expect that the rules would frequently mention crime victims, given the subjects - such as bail, scheduling, and restitution - that directly concern victims. Yet amazingly, the current rules substantively use the word "victim" only a single time.

The single direct reference to victims is Rule 32(i)(4)(B), which directs that before imposing a sentence, "the court must address any victim of a crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence." [3] The word "victim" appears in passing in only two other rules: Rule 12.4 requires the government to disclose to the court any organizational "victim," [4] and the heading of Rule 38(e) mentions "Restitution" and "Notice to Victims," but the text of the rule does not contain the term "victim." [5]

Victims deserve far more than the single reference in Rule 32. While later parts of this Article work through the rules section-by-section to illustrate where victims have been unfairly ignored, [6] a few examples here will prove the point. The rules currently fail to give victims any right to be heard regarding whether a judge should accept a plea, even though the judge must evaluate the public interest in deciding whether to do so. [7] The rules fail to require notice to victims before their confidential

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[3] *Fed. R. Crim. P. 32(i)(4)(B)*.

[4] Id. at 12.4(a)(2).

[5] Id. at 38(e) (mentioning "victim" in the heading of the rule).

[6] See discussion infra Part IV.

[7] See *Fed. R. Crim. P. 11*; discussion infra notes 148-53 and accompanying text.

information is subpoenaed from third parties - such as schools or medical providers - even though victims have compelling privacy interests to protect. [8] And the rules do not protect the victim's right to attend trials, despite **[*840]** victims' long history of having at least some protected interest in observing trials and other proceedings. [9]

One provision conveniently encapsulates the surprising absence of victims from the rules: Rule 32(d)(2)(B). The drafters of this rule [10] appear to have been so afraid to utter the word "victim" that they did not use the term even when describing the person harmed by a crime. Rule 32(d)(2)(B) directs that a presentence report contain "verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed." [11] The phrasing of this provision is striking for several reasons. It eschews the straightforward term "victim," preferring instead the obscuring phrase "individual against whom the offense has been committed." The provision also uses the responsibility-obscuring passive voice in describing the individual "against whom" the offense has been committed, leaving the reader to wonder who might have committed that offense (the defendant, perhaps?). Interestingly, the provision requires that information about the victim be "verified." Fair enough - until one realizes that the directly adjacent provision regarding information about the defendant lacks a similar verification requirement. [12] Why would information about the victim need to be verified while information about the defendant would not? Finally, the provision requires that victim information be stated in a "nonargumentative" style. Again, the adjacent defendant's provision contains no such direction. [13] In short, even a rule that seemingly must mention victims - the rule dictating preparation of a presentence report describing the crime - manages to avoid mentioning the word.

B. The Victims' Rights Movement

That victims are missing from the Federal Rules of Criminal Procedure exemplifies their treatment in the modern American **[*841]** criminal justice system. As one commentator has described the situation, the victim is "seen at best as "the forgotten man' of the system and, at worst, as being twice victimized, the second time by the very system to which he has turned for justice." [14] The absence of victims conflicts with "a public sense of justice keen enough that it has found voice in a nationwide victims' rights movement." [15]

The crime victims' rights movement developed in the 1970s because of a perceived imbalance in the criminal justice system. Led by feminist and civil rights activists, victims' advocates argued that the criminal justice system had become preoccupied

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[8] See *Fed. R. Crim. P. 17*; discussion infra notes 177-91, and accompanying text.

[9] See *Fed. R. Crim. P. 43*; discussion infra notes 269-300 and accompanying text.

[10] To be clear, Congress, not the Advisory Committee on Criminal Law and Procedure, drafted the language of this rule. See Victims of Crime Act of 1984, Pub. L. No. 98-473, *98 Stat. 2014 (1984)* (directly amending Rule 32).

[11] *Fed. R. Crim. P. 32(d)(2)(B)* (emphasis added).

[12] Id. at 32(d)(2)(A).

[13] Id.

[14] William F. McDonald, Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim, 13 Am. Crim. L. Rev. 649, 650 (1976).

[15] *Payne v. Tennessee, 501 U.S. 808, 834 (1991)* (Scalia, J., concurring) (internal quotation marks omitted). See generally Douglas Evan Beloof, Paul G. Cassell & Steve J. Twist, Victims in Criminal Procedure 29-37 (2005); Shirley S. Abrahamson, Redefining Roles: The Victims' Rights Movement, 1985 Utah L. Rev. 517; Douglas Evan Beloof, The Third Model of Criminal Process: The Victim Participation Model, *1999 Utah L. Rev. 289* [hereinafter Beloof, The Third Model of Criminal Process]; Paul G. Cassell, Balancing the Scales of Justice, *1994 Utah L. Rev. 1373, 1380-82;* Abraham S. Goldstein, Defining the Role of the Victim in Criminal Prosecution, 52 Miss. L.J. 514 (1982); Erin Ana O'Hara, Victim Participation in the Criminal Process, *13 J.L. & Pol'y 229 (2005);* William T. Pizzi & Walter Perron, Crime Victims in German Courtrooms: A Comparative Perspective on American Problems, *32 Stan. J. Int'l L. 37 (1996).*

with defendants' rights to the exclusion of crime victims' legitimate interests. [16] These advocates urged reforms to give more attention to victims' concerns, including protecting the victim's right to be notified of court hearings, to attend those hearings, and to be heard at appropriate points in the process.

The victims' rights movement received considerable impetus with the publication in 1982 of the Report of the President's Task Force on Victims of Crime. [17] The Task Force concluded that the criminal justice system "has lost an essential balance … . The system has deprived the innocent, the honest, and the helpless of its protection … . The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed." [18] The Task Force advocated **[*842]** multiple reforms. It recommended that prosecutors assume the responsibility for keeping victims notified of all court proceedings and bringing to the court's attention the victim's view on such subjects as bail, plea bargains, sentences, and restitution. [19] The Task Force also urged that courts receive victim impact evidence at sentencing, order restitution in most cases, and allow victims and their families to attend trials even if they are also called as witnesses. [20] In its most sweeping recommendation, the Task Force proposed a federal constitutional ***amendment*** to protect crime victims. The Task Force proposed adding to the ***Sixth Amendment***'s protections for defendants' rights a provision allowing crime victims to be present and heard: "Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings." [21]

In the wake of that recommendation, crime victims' advocates considered how best to pursue a federal constitutional ***amendment*** that would protect victims' rights throughout the country. Recognizing the difficulty of obtaining the consensus required to amend the United States Constitution, advocates decided to go to the states first to pursue state victims' rights ***amendments***. This "states-first" strategy [22] met with considerable success. To date, some thirty states have adopted victims' rights ***amendments*** to their own state constitutions. [23] While these ***amendments*** take various forms, Arizona's ***amendment*** illustrates the types of rights typically protected. The Arizona constitutional provision gives victims the broad right to "be treated with fairness, respect, and dignity, and to **[*843]** be free from intimidation, harassment, or abuse, throughout the criminal justice process." [24] It also specifically confers a right to "be present at, and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present." [25] The ***amendment*** further allows victims to be heard at bail, plea, and sentencing hearings. [26]

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[16] See generally Beloof, Cassell & Twist, supra note 15, at ch. 1; Douglas E. Beloof, The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review, *2005 BYU L. Rev. 255* [hereinafter Beloof, The Third Wave of Crime Victims' Rights]; Cassell, supra note 15, at 1381-82.

[17] President's Task Force on Victims of Crime, Final Report 114 (1982).

[18] Id.

[19] Id. at 63.

[20] Id. at 72-73.

[21] Id. at 114.

[22] See S. Rep. No. 108-191, at 3 (2004), as reprinted in 2004 U.S.C.A.N.

[23] Alaska Const. art. I, 24; Ariz. Const. art. II, 2.1; Cal. Const. art. I, 12, 28; Colo. Const. art. II, 16(a); Conn. Const. art. I, 8(b); Fla. Const. art. I, 16(b); Idaho Const. art. I, 22; Ill. Const. art. I, 8.1; Ind. Const. art. I, 13(b); Kan. Const. art. 15, 15; La. Const. art. 1, 25; Md. Decl. of Rights art. 47; Mich. Const. art. I, 24; Miss. Const. art. 3, 26(A); Mo. Const. art. I, 32; Neb. Const. art. I, 28; Nev. Const. art. I, 8(2); N.J. Const. art. I, 22; N.M. Const. art. 2, 24; N.C. Const. art. I, 37; Ohio Const. art. I, 10(a); Okla. Const. art. II, 34; Or. Const. art. I, 42-43; R.I. Const. art. I, 23; S.C. Const. art. I, 24; Tenn. Const. art. 1, 35; Tex. Const. art. I, 30; Utah Const. art. I, 28; Va. Const. art. I, 8-A; Wash. Const. art. 1, 35; Wis. Const. art. I, 9(m). These ***amendments*** passed with overwhelming popular support.

[24] Ariz. Const. art. II, 2.1(A)(1).

[25] Id. 2.1(A)(3).

[26] Id. 2.1(A)(4).

The movement also successfully prodded the federal system to recognize victims' rights. In 1982 Congress passed the first federal victims' rights legislation, the Victim and Witness Protection Act (VWPA). [27] The VWPA had three primary goals: (1) to expand and protect the role of victims and witnesses in the criminal justice process; (2) to ensure that the federal government used all available resources to protect and assist victims without infringing defendants' constitutional rights; and (3) to provide a model for state and local legislation. [28] Since passage of the VWPA, Congress has remained active in this area of the law, passing several acts further protecting victims' rights, such as the Victims of Crime Act of 1984, [29] the Victims' Rights and Restitution Act of 1990, [30] the Violent Crime Control and Law Enforcement Act of 1994, [31] the Antiterrorism and Effective Death Penalty Act of 1996, [32] and the Victim Rights Clarification Act of 1997. [33] Other federal statutes have been passed to deal with specialized victim situations such as child victims and witnesses. [34]

[*844] These statutes spawned guidelines for how federal prosecutors should treat crime victims. The VWPA required the Attorney General to develop guidelines for the Department of Justice. [35] To implement this Act, the Attorney General developed guidelines designed to assist victims during the criminal justice process, mandating protocol, separate waiting areas at court, the prompt return of the victim's property, and victim training for law enforcement personnel. [36] The guidelines also directed that prosecutors notify victims about available services, major case events, consultations with the prosecutor, and the opportunity for consultation about the prosecution. [37] In 2000, Attorney General Reno updated and expanded the guidelines. The revised guidelines heightened the notification requirements, requiring prosecutors and law enforcement agents to notify victims of important criminal justice events and to confer with victims about important decisions in the process. [38]

Among the federal victims' statutes, the Victims' Rights and Restitution Act of 1990 is noteworthy. This Act purported to create a comprehensive list of victims' rights in the federal criminal justice process. It commanded that "[a] crime victim has the following rights" and then listed various procedural rights, including the right to "be treated with fairness and with respect for the victim's dignity and privacy," [39] to "be notified of court proceedings," [40] to "confer with [the] attorney for the Government in the case," [41] and to attend court proceedings even if called as a witness. [42] The statute also directed the Justice Department

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[27] Pub. L. No. 97-291, *96 Stat. 1248 (1982)* (codified as amended in scattered sections of 18 U.S.C.).

[28] Id.

[29] Pub. L. No. 98-473, *98 Stat. 2170 (1984)* (codified as amended at *42 U.S.C. 10601*-03 (2000); *18 U.S.C. 3013;* id. 3671).

[30] Pub. L. No. 101-647, ***104 Stat. 4820 (1990)*** (codified as amended at *42 U.S.C. 10601,* 10606-07).

[31] Pub L. No. 103-322, ***108 Stat. 1796 (1994)*** (codified as amended in scattered sections of U.S.C.).

[32] Pub. L. No. 104-132, ***110 Stat. 1214 (1996)*** (codified as amended in scattered sections of U.S.C.).

[33] Pub. L. No. 105-6, ***111 Stat. 12*** (codified as amended at *18 U.S.C. 3510).*

[34] See, e.g., *18 U.S.C. 3509* (protecting rights of child victim-witnesses); Pub L. No. 101-647, ***104 Stat. 4789 (1990).***

[35] Victim and Witness Protection Act, Pub. L. No. 97-291, 6(a), *96 Stat. 1248, 1252 (1982).*

[36] U.S. Dep't of Justice, Office of the Att'y Gen., Attorney General Guidelines for Victim and Witness Assistance (1995).

[37] Id.

[38] U.S. Dep't of Justice, Office of the Att'y Gen., Attorney General Guidelines for Victim and Witness Assistance 31-37 (2000) [hereinafter 2000 A.G. Guidelines]. The Guidelines were recently revised. See U.S. Dept. of Justice, Office for Victims of Crime, Attorney General Guidelines for Victim and Witness Assistance (2005) [hereinafter 2005 A.G. Guidelines].

[39] *42 U.S.C. 10606*(b)(1) (repealed 2004).

to make "its best efforts" to ensure **[*845]** that victims' rights were protected. [43] Yet this federal statute never successfully integrated victims into the federal criminal justice process and instead became something of a dead letter. Because Congress passed the ***CVRA*** in 2004 to remedy the problems with the 1990 Act, a brief review of the law's shortcomings is valuable.

Curiously, the 1990 Victims' Rights and Restitution Act was codified in Title 42 of the United States Code - the Title dealing with "Public Health and Welfare." Such placement effectively limited the Act's effectiveness because federal practitioners reflexively consult Title 18, the Title that covers "Crimes and Criminal Procedure," [44] for guidance on criminal law issues. More prosaically, federal criminal enactments are bound together in a single West publication entitled the Federal Criminal Code and Rules. This publication is carried to court by prosecutors and defense attorneys and is on the desk of most federal judges. Because West Publishing never included the Victims' Rights Act in this book, the statute was essentially unknown even to experienced judges and attorneys. [45]

The prime illustration of the ineffectiveness of the Victims' Rights and Restitution Act comes from the Oklahoma City bombing case. [46] While one might expect victims' rights would have been fully protected during such a high profile trial, in fact victims were denied one fundamental right: the right to observe court proceedings. During a pretrial motion hearing, the district court sua sponte precluded any victim who wished to provide victim impact testimony at sentencing from observing proceedings in the case. [47] The court based its ruling on *Rule 615 of the Federal Rules of Evidence* - the so-called "Rule on Witnesses." [48] Thirty-five victims and survivors of **[*846]** the bombing then filed a motion for reconsideration. [49] They noted that the district court apparently had overlooked the Victims' Rights Act giving victims the right "to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial." [50] The district court denied the motion for reconsideration. [51] It concluded that victims present during court proceedings would not be able to separate the "experience of trial" from "the experience of loss from the conduct in question," and, thus, their testimony at a sentencing hearing would be inadmissible. [52] Unlike the original ruling, which was explicitly premised on Rule 615, the later ruling was more ambiguous, alluding to concerns under the Constitution, the common law, and the rules of evidence. [53]

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[40] Id. 10606(b)(3) (repealed 2004).

[41] Id. 10606(b)(5) (repealed 2004).

[42] Id. 10606(b)(4) (repealed 2004). Testifying victims can attend proceedings unless the victim's testimony "would be materially affected" by hearing other testimony at trial. Id.

[43] Id. 10606(a) (repealed 2004).

[44] 18 U.S.C. (2000).

[45] Last year, I wrote a letter to West Publishing requesting that they include the law in their book. That request became moot with the passage of the ***CVRA***, which moved victims' rights from obscurity in Title 42 to centrality in Title 18, thereby guaranteeing them a spot in the West publication.

[46] See generally Paul G. Cassell, Barbarians at the Gates? A Reply to the Critics of the Victims' Rights ***Amendment***, *1999 Utah L. Rev. 479, 515-22* (discussing the Oklahoma City bombing case in greater detail).

[47] See United States v. McVeigh, No. 96-CR-68, 1996 WL 366268, at 2 (D. Colo. June 26, 1996).

[48] Id. at 2-3 (discussing application of *Fed. R. Evid. 615*).

[49] Motion of Marsha and Tom Kight et al. and the National Organization for Victim Assistance Asserting Standing To Raise Rights Under the Victims' Bill of Rights and Seeking Leave To File a Brief as Amici Curiae, United States v. McVeigh, No. 96-CR-68-M, 1996 WL 570841 (D. Colo. Sept. 30, 1996). I represented a number of the victims on this matter on a pro bono basis, along with able co-counsel Robert Hoyt, Arnon Siegel, and Karan Bhatia of the Washington, D.C. law firm of Wilmer, Cutler, and Pickering, and Sean Kendall of Boulder, Colorado.

[50] *42 U.S.C. 10606*(b)(4) (1994) (repealed 2004). The victims also relied on a similar provision found in the authorization for closed circuit broadcasting of the trial, *42 U.S.C.A. 10608*(a) (West Supp. 1998), and on a First ***Amendment*** right of access to public court proceedings. See *Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 577 (1980)* (finding First ***Amendment*** right of court access).

The victims subsequently filed a petition for writ of mandamus in the U.S. Court of Appeals for the Tenth Circuit seeking review of the district court's ruling. [54] Three months later, a Tenth Circuit panel rejected the victims' claims. [55] The circuit found "a number of problems with the excluded witnesses' reliance on the Victims' Rights Act." [56] Indeed, the circuit found that the Act created no obligations for courts:

[*847]

The statute charily pledges only the "best efforts" of certain executive branch personnel to secure the rights listed. The district court judge, a judicial officer not bound in any way by this pledge, could not violate the Act. Indeed, the Act's prescriptions were satisfied once the government made its arguments against sequestration - before the district court even ruled. [57]

Efforts by both the victims and the Department of Justice to obtain a rehearing were unsuccessful, [58] despite the support of separate briefs urging such a rehearing from forty-nine members of Congress, all six Attorneys General in the Tenth Circuit, and some of the leading victims' groups in the nation. [59]

In the meantime, the victims, supported by the Oklahoma Attorney General's Office, sought remedial legislation in Congress clearly providing that victims should not have to decide between testifying at sentencing or watching the trial. A bill was introduced to provide that watching a trial in a capital case does not constitute grounds for denying a victim the chance to provide an impact statement. In a matter of weeks, Congress passed the Victims Rights Clarification Act of 1997, [60] but even that specific statute failed to protect the bombing victims' rights. The district court in the Oklahoma City case found that the statute had constitutional problems. [61]

Because of the difficulty accompanying the statutory protection of victims' rights, victims advocates decided to press for a federal constitutional ***amendment***. They argued that the statutory **[*848]** protections could not sufficiently guarantee victims' rights. In their view, such statutes "frequently fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, [or] sheer inertia." [62] As the Justice Department reported:

Efforts to secure victims' rights through means other than a constitutional ***amendment*** have proved less than fully adequate. Victims' rights advocates have sought reforms at the state level for the past [twenty] years, and many states have responded

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[51] McVeigh, 1996 WL 366268 at 25.

[52] Id. at 24.

[53] See id.

[54] Petition for Writ of Mandamus, Kight et al. v. Matsch, No. 96-1484 (10th Cir. Nov. 6, 1996) (on file with author).

[55] *United States v. McVeigh, 106 F.3d 325, 328 (10th Cir. 1997),* superseded by statute, *18 U.S.C. 3510.*

[56] *Id. at 334-35.*

[57] *Id. at 335* (internal citation omitted).

[58] See Order, United States v. McVeigh, No. 96-1469, 1997 WL 128893, at 3 (10th Cir. Mar. 11, 1997).

[59] See *Brief for Amici Curiae Washington Legal Foundation and United States Senator Don Nickles and 48 Other Members of Congress, United States v. McVeigh, 106 F.3d 325* (10th Cir. Feb. 14, 1997) (No. 96-1469); *Brief for Amici Curiae States of Oklahoma, Colorado, Kansas, New Mexico, Utah, and Wyoming Supporting the Suggestion for Rehearing and the Suggestion for Rehearing En Banc by the Oklahoma City Bombing Victims and the United States, United States v. McVeigh, 106 F.3d 325* (10th Cir. Feb. 14, 1997) (No. 96-1469); Brief for Amici Curiae National Victims Center, Mothers Against Drunk Driving, National Victims' Constitutional ***Amendment*** Network, Justice for Surviving Victims, Inc., Concerns of Police Survivors, Inc., and Citizens for Law and Order, Inc., in *Support of Rehearing, United States v. McVeigh, 106 F.3d 325* (10th Cir. Feb. 17, 1997) (No. 96-1469).

[60] Pub. L. No. 105-6, ***111 Stat. 12 (1997).***

[61] See generally Cassell, supra note 46, at 519-20 (recounting problems).

[62] Laurence H. Tribe & Paul G. Cassell, Embed the Rights of Victims in the Constitution, L.A. Times, July 6, 1998, at B5.

with state statutes and constitutional provisions that seek to guarantee victims' rights. However, these efforts have failed to fully safeguard victims' rights. These significant state efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights. [63]

To place victims' rights in the Constitution, victims advocates - led most prominently by the National Victims Constitutional ***Amendment*** Network [64] - approached the President and Congress regarding a federal ***amendment***. [65] On April 22, 1996, Senators Kyl and Feinstein with the backing of President Clinton introduced a federal victims' rights ***amendment***. [66] The ***amendment*** was intended to "restore, preserve, and protect, as a matter of right for the victims of violent crimes, the practice of victim participation in the administration of criminal justice that was the birthright of every American at the founding of our Nation." [67] A companion resolution was introduced in the House of Representatives. [68] The proposed ***amendment*** embodied seven core principles: (1) the right to notice of proceedings, (2) the right to be present at the proceedings, (3) the right to be heard, (4) the right to notice of the defendant's **[*849]** release or escape, (5) the right to restitution, (6) the right to a speedy trial, and (7) the right to reasonable protection. In a later resolution, an eighth principle was added: the right to standing to enforce these rights. [69] The 104th Congress did not pass the ***amendment***.

On January 21, 1997, the opening day of the first session of the 105th Congress, Senators Kyl and Feinstein reintroduced the victims' rights ***amendment***. [70] A series of hearings were held that year in both the House and the Senate. [71] Kyl and Feinstein reintroduced the ***amendment*** the following year. [72] The Senate Judiciary Committee held hearings [73] and passed the proposed ***amendment*** out of committee. [74] Yet again, the full Senate did not consider the ***amendment***.

In 1999, Senators Kyl and Feinstein again proposed the ***amendment***, [75] and on September 30, 1999, the Judiciary Committee voted, as before, to send the ***amendment*** to the full Senate. [76] But on April 27, 2000, after three days of floor debate, the ***amendment*** was shelved when it became clear that its opponents, who objected to constitutionalizing victims' rights, possessed the necessary votes to sustain a filibuster. [77] At the same time, hearings on the companion measure were held in the House. [78]

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[63] Focusing on the Administration of Justice and the Enforcement of Laws: Dep't of Justice Oversight Hearing Before the S. Judiciary Comm., 104th Cong. 23-24 (1997) (statement of Janet Reno, Att'y Gen. of the United States).

[64] See http://www.nvcan.org. See generally Twist, supra note 2.

[65] For a comprehensive history of victims' efforts to pass a constitutional ***amendment***, see Twist, supra note 2.

[66] S.J. Res. 52, 104th Cong., 2d Sess. (1996).

[67] S. Rep. No. 108-191, at 1-2 (2003); see also S. Rep. No. 106-254 (2000).

[68] H.R.J. Res. 174, 104th Cong., 2d Sess. (1996).

[69] See S.J. Res. 65, 104th Cong., 2d Sess. (1996).

[70] S.J. Res. 6, 105th Cong., 1st Sess. (1997).

[71] See, e.g., Victims' Rights ***Amendment***: Hearings Before the Sen. Judiciary Comm., 105th Cong., 2d Sess. (1997).

[72] S.J. Res. 44, 105th Cong., 2d Sess. (1998).

[73] Victim's Rights ***Amendment***: Hearings Before the Sen. Judiciary Comm., 105th Congress (1998).

[74] See 144 Cong. Rec. S11,010 (daily ed. Sept. 28, 1998) (statement of Sen. Kyl).

[75] S.J. Res. 3, 106th Cong., 1st Sess. (1999).

[76] 146 Cong. Rec. S2966 (daily ed. Apr. 27, 2000).

[77] See id.

[78] H.R.J. Res. 64, 106th Cong., 1st Sess. (2002).

Discussions about the ***Amendment*** began again soon after the 2000 presidential elections. On April 15, 2002, Senators Kyl and Feinstein reintroduced the ***Amendment*** in the Senate, [79] and the following day, President Bush announced his support. [80] On May 1, **[*850]** 2002, a companion measure was proposed in the House. [81] On January 7, 2003, Senators Kyl and Feinstein proposed the ***amendment*** as Senate Judiciary Resolution 1. The Senate Judiciary Committee held hearings in April of that year, [82] followed by a written report supporting the ***Amendment***. [83] Shortly thereafter, a motion to proceed to consideration of the measure was withdrawn when proponents determined they did not have the sixty-seven votes necessary to pass the ***amendment***. After it became clear that the necessary super-majority votes to amend the Constitution were not attainable, victims' advocates turned their attention to enacting a comprehensive victims' rights statute.

C. The Crime Victims' Rights Act

The Crime Victims' Rights Act ultimately resulted from a decision by the victims' movement to seek a more comprehensive and enforceable federal statute rather than to continue pursuing the more ambitious goal of a federal constitutional ***amendment***. In April 2004, victims advocates met with Senators Kyl and Feinstein to decide whether to push yet again for a federal constitutional ***amendment***. Conceding that the ***amendment*** had only majority support in Congress rather than the necessary super-majority, the advocates decided to press for a far-reaching federal statute protecting victims' rights in the federal criminal justice system. [84] In exchange for backing off from the federal ***amendment*** in the short term, victims' advocates received near-universal congressional support for a "broad and encompassing" statutory victims' bill of rights. [85] This new approach not only established a string of victims' rights but also provided funding for victims' legal services and created remedies for the violation of victims' rights. [86] The victims' **[*851]** movement is currently evaluating the success of the statute before deciding whether to continue pushing for a federal ***amendment***. [87]

The Crime Victims' Rights Act gives victims "the right to participate in the system." [88] To facilitate such participation, the Act grants victims eight specific rights:

(1) The right to be reasonably protected from the accused;

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused;

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding;

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[79] S.J. Res. 35, 107th Cong., 2d Sess. (2002).

[80] 149 Cong. Rec. S82 (daily ed. Jan. 7, 2003) (statement of Sen. Kyl).

[81] H.R.J. Res. 91, 107th Cong., 2d Sess. (2002).

[82] A Proposed Constitutional ***Amendment*** To Protect Crime Victims: Hearing on S.J. Res. 1 Before the S. Judiciary Comm., 108th Congress, 108-189 (2003).

[83] S. Rep. No. 108-191 (2003).

[84] See Twist, supra note 2.

[85] 150 Cong. Rec. S4261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[86] Id. at S4263 (statement of Sen. Feinstein).

[87] Id. (statement of Sen. Feinstein); see also Att'y Gen. Alberto R. Gonzales, Prepared Remarks at the Hoover Inst. Bd. of Overseers Conference (Feb. 28, 2005) (indicating that a federal victims' rights ***amendment*** remains a priority for President Bush), available at http://www.usdoj.gov/ag/speeches/2005/02282005 agremarkshov.htm.

[88] 150 Cong. Rec. S4263 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein). For a description of victim participation, see Beloof, The Third Model of Criminal Process, supra note 15.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding;

(5) The reasonable right to confer with the attorney for the Government in the case;

(6) The right to full and timely restitution as provided in law;

(7) The right to proceedings free from unreasonable delay;

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy. [89]

Rather than relying merely on the "best efforts" of prosecutors to vindicate rights, the ***CVRA*** also contains specific enforcement **[*852]** mechanisms. [90] Most importantly, it directly gives victims standing to assert their rights, addressing a flaw in the earlier enactment. [91] The Act provides that rights can be "asserted" by "the crime victim, the crime victim's lawful representative, and the attorney for the Government." [92] The victim or the government may appeal any denial of a victim's right through a writ of mandamus on an expedited basis. [93] The courts are also required to "ensure that the crime victim is afforded the rights" in the new law. [94]

These changes were intended to make the victim "an independent participant in the proceedings." [95] Congress desired to modify what it viewed as the unfair treatment of crime victims; in particular, congressional sponsors of the ***CVRA*** cited the Oklahoma City bombing case as the kind of decision that they intended the new law to overrule. [96]

III. The Need To Place Victims' Rights in the Rules

With the ***CVRA*** in place as the law of the land, the Federal Rules of Criminal Procedure should be amended to conform to the statute. While one court has derisively referred to the Act as mere "mushy, feel good legislation," [97] it in fact substantively changes the posture of crime victims on a whole host of issues. In the wake of the Act, victims now must be folded into the process through which federal courts conduct criminal cases, including bail, plea, trial, and sentencing hearings. The Federal Rules of Criminal Procedure - the "playbook" of the federal courts - should reflect this fact.

Some might agree that victims now have a number of new rights, but nonetheless dispute the need for a rules ***amendment***. After all, it might be argued, the ***CVRA*** in fact creates substantive rights for crime victims. Because nothing in the federal procedural **[*853]** rules can modify substantive rights, [98] the ***CVRA*** will trump any conflicting provision in the federal rules. [99] In other words, the ***CVRA*** will automatically govern federal criminal proceedings even if the rules remain as written.

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[89] *18 U.S.C.A. 3771*(a) (West 2004 & Supp. 2005).

[90] Id. 3771(d).

[91] Cf. Beloof, The Third Wave of Crime Victims' Rights, supra note 16 (identifying the lack of victim standing as a pervasive flaw in victims' rights enactments).

[92] *18 U.S.C.A. 3771*(d)(1).

[93] Id. 3771(d)(3).

[94] Id. 3771(b).

[95] 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[96] Id. at S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[97] ***United States v. Holland, 380 F. Supp. 2d 1264, 1279 (N.D. Ala. 2005).***

[98] See *28 U.S.C. 2072*(b) (2000).

[99] See, e.g., *Miguel v. Country Funding Corp., 309 F.3d 1161, 1165 (9th Cir. 2002).*

While this argument is legally precise, as a practical matter, compelling reasons justify amending the federal rules to include victims. Congress intended that the ***CVRA***'s new rights not be "simply words on paper," but rather "meaningful and functional" reforms. [100] To that end, Congress mandated that courts shall "ensure" that crime victims are "afforded the rights" conveyed by the ***CVRA***. [101] To effectively ensure that victims' rights are protected, these rights must become part of the warp and woof of the criminal process. That can occur only if the federal rules - the day-to-day operations manual of the courts - spell out how to integrate victims into the process.

Judges and practitioners frequently refer to the Federal Rules of Criminal Procedure for guidance as to how to conduct hearings. If victims' rights are left out of the federal rules, the strong possibility exists that courts may mistakenly disregard victims' rights under the ***CVRA***. A good illustration comes from Rule 11, which spells out in some detail how judges should conduct a hearing accepting a plea. The judge is required to personally inform the defendant of certain specified rights and ensure that the defendant understands he will be waiving those rights. [102] The judge must also determine that the defendant is voluntarily entering the plea and that there is a factual basis for the guilty plea. [103] Under the ***CVRA***, victims now also have the right to be heard before the judge accepts any plea. [104] This is a new right, [105] which judges are not accustomed to administering. Unless the victim's right to be heard is specifically spelled out in Rule 11's plea procedures, some judges may inadvertently disregard it.

[*854] The Oklahoma City bombing case further demonstrates how courts sometimes blindly follow the federal rules without considering superseding statutes. In that case, the court excluded victim-witnesses from certain proceedings, relying solely on *Federal Rule of Evidence 615* in making its determination. In denying the witnesses entrance to the proceedings, the court was apparently unaware of the provision in the Victims' Rights and Restitution Act protecting a victim's right to attend. [106] This deficiency was called to the attention of the Advisory Committee on the Federal Rules of Evidence. [107] The committee acknowledged the need to include victims in the evidence rules and later added a new provision reflecting the victim's right to attend. [108]

One reason for including victims' rights in the rules is to avoid litigation about the negative inferences that might be drawn if victims' rights are not in the rules. It is a well-settled principle of statutory construction that expressio unius est exclusio alterius (the expression of one thing implies the exclusion of the other). This canon of construction applies to the federal rules as much as to statutes. [109] Because the rules repeatedly spell out situations in which the defendant has the right to have his interests considered but say nothing about victims, it might be argued that the rules have implicitly determined that a victim's interests are irrelevant. To return to the Rule 11 plea example, given that the criminal rules specify that a court must address the defendant but lack any comparable requirement for victims, it might be inferred that victims cannot speak at plea hearings. Any

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[100] 150 Cong. Rec. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[101] *18 U.S.C.A. 3771*(b) (West 2004 & Supp. 2005).

[102] *Fed. R. Crim. P. 11(b)(1)*.

[103] Id. at 11(b)(2), (b)(3).

[104] *18 U.S.C.A. 3771*(a)(4).

[105] Cf. *42 U.S.C. 10606*(b) (listing victims' rights; right to be heard at pleas not included) (repealed by *18 U.S.C. 3771).*

[106] See supra note 45 and accompanying text.

[107] See Letter from Paul G. Cassell to Advisory Comm. (on file with author).

[108] See *Fed. R. Evid. 615* advisory committee's notes (1998 ***Amendments***).

[109] See, e.g., *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993).*

such conclusion would be contrary to the plain language of the ***CVRA***. [110] To avoid possible confusion, the rules should be clear on this point.

An additional reason for integrating victims into the federal rules is that Congress seemingly expects this to happen. Congress adopted the ***CVRA*** with the express goal of making the new law "a formula **[*855]** for success" and a "model for our States." [111] Congress clearly wants the new law aggressively implemented, thereby avoiding the need for further legislative action or even, possibly, a federal constitutional ***amendment***. Congress is watching to see whether the Judiciary (and the Executive) will fully and fairly implement this new Act. As Senator Leahy warned, "Passage of this bill will necessitate careful oversight of its implementation by Congress." [112]

Construing the ***CVRA*** to require changes is also appropriate because the Act is remedial legislation. As the Supreme Court has instructed, "When Congress uses broad generalized language in a remedial statute, and that language is not contravened by authoritative legislative history, a court should interpret the provision generously so as to effectuate the important congressional goals." [113] The congressional sponsors described the victims' rights in the ***CVRA*** as "broad rights," [114] the significance of which should not "be whittled down or marginalized by the courts or the executive branch. This legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process." [115]

A final reason for amending the rules is that crime victims' groups are looking for the effective implementation of the ***CVRA***. They are urging that the federal rules be comprehensively amended to reflect victims' rights; indeed, they have even suggested that Congress should directly amend the federal rules to include victims' rights. [116] The Judiciary would be well advised not to ignore these lobbying efforts. Victims have proven very effective at advancing legislation in Congress, particularly where they have legitimate grievances about how they have been treated. [117]

Moreover, allowing the initiative for drafting of rules to pass from the Judiciary to Congress is not ideal. The Advisory Committee on Federal Rules of Criminal Procedure includes many skilled **[*856]** members with considerable experience in drafting rules. The Committee is well aware of the ***CVRA***. Shortly after the passage of the ***CVRA***, the Committee withdrew a modest victim ***amendment*** it was proposing in anticipation of the need to make more extensive changes, [118] and is already working on proposed ***amendments*** to the rules. [119] It is preferable to have victims integrated into the federal rules through careful drafting by the Committee rather than by the potentially blunderbuss approach of direct congressional action.

For all these reasons, the Federal Rules of Criminal Procedure should be comprehensively amended to recognize the interests of crime victims and thereby to allow victims to be full participants in the criminal process.

IV. Proposed ***Amendments*** to the Federal Rules of Criminal Procedure To Implement the ***CVRA***

With the goal of effectively implementing the ***CVRA*** firmly in mind, the remainder of this Article proposes twenty-eight specific rule changes for consideration by the Advisory Committee on Criminal Rules. The individual sections that follow first

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[110] *18 U.S.C.A. 3771*(a)(4) (Victims have "the right to be … heard" at any public proceeding "involving … [a] plea.").

[111] 150 Cong. Rec. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[112] Id. at S4271 (statement of Sen. Leahy).

[113] *California v. Am. Stores Co., 495 U.S. 271, 279 n.4 (1990)* (quoting *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404, 428 (1st Cir. 1990)).*

[114] 150 Cong. Rec. S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[115] Id. (statement of Sen. Feinstein).

[116] Interview with Steve J. Twist, Nat'l Victims' Constitutional ***Amendment*** Network (March 11, 2005).

[117] See supra notes 27-34 and accompanying text (recounting victims' legislation passed by Congress).

[118] See infra note 223 and accompanying text.

[119] Telephone interview with Judge Susan C. Bucklew, Chair, Adv. Comm. on Fed. Rules of Criminal Procedure (May 2005).

recite a specific proposed change followed by the rationale for that change as both a matter of law and of policy. For convenience, this Article discusses the proposed changes sequentially, beginning with Rule 1.

Rule 1 - Definition of "Victim"

The Proposal:

Rule 1 should be amended to include the following definition of a victim:

"Victim" means a person directly and proximately harmed as a result of the commission of a federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as **[*857]** suitable by the court, may assume the crime victim's rights under these rules, but in no event shall the defendant be named as such guardian or representative.

The Rationale:

The ***CVRA*** directly defines "victim" using this language, [120] which ought to be folded into the rules for convenience. The rules currently define such terms as "attorney for the government," "federal judge," and "petty offense." [121] "Victim" should likewise be defined.

A definition is required for a second reason: Rule 32 currently contains a differing definition of "victim" as "an individual against whom the defendant committed an offense for which the court will impose sentence." [122] Because that definition varies from that mandated by the ***CVRA***, it must be changed. Furthermore, the ***CVRA***'s definition comes with an interpretative history. [123] The ***CVRA***'s definition of "victim" is taken almost verbatim from the 1996 Mandatory Victims Restitution Act (MVRA). [124] In turn, the MVRA drew on the 1982 Victim Witness Protection Act (VWPA). [125] As a result, the ***CVRA*** uses a definition of "victim" that is more than twenty-two years old and that has not produced major administrative or definitional problems. Courts will be able to draw from that history to determine who qualifies as a "victim." [126]

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[120] *18 U.S.C.A. 3771*(e) (West 2004 & Supp. 2005).

[121] See *Fed. R. Crim. P. 1(b)(1)*, *1(b)(3)*, *1(b)(8)*.

[122] Id. at 32(a)(2).

[123] See generally Beloof, Cassell & Twist, supra note 15, at 49-69 (reviewing different definitions of "victim" for purposes of crime victims' legislation).

[124] See *18 U.S.C. 3663A*(a)(2). For differences from the old law, see Twist, supra note 2.

[125] See *18 U.S.C. 3663*(a)(2).

[126] See, e.g., *Hughey v. United States, 495 U.S. 411 (1990)* (holding that VWPA limited "victim" to victims of the actual offense of conviction so that district court could not order restitution on basis of charges that were dropped as part of plea agreement); *United States v. Follet, 269 F.3d 996 (9th Cir. 2001)* (holding that a free clinic was not a "victim" of the defendant's rape of his niece); *Moore v. United States, 178 F.3d 994 (8th Cir. 1999)* (holding that a bank customer was "victim" of attempted bank robbery under MVRA where defendant pointed a sawed-off shotgun at the customer and the teller, who were standing only two feet apart, while demanding money), cert. denied, ***528 U.S. 943 (1999);*** *United States v. Sanga, 967 F.2d 1332 (9th Cir. 1992)* (holding that foreign national who conspired to be brought into United States illegally was still a "victim" of the conspiracy where her smuggler threatened her life and forced her to work as live-in maid once she had arrived); *United States v. Bedonie, 317 F. Supp. 2d 1285 (D. Utah 2004)* (holding that "victim" in manslaughter case under MVRA was murdered person himself and not the estate), rev'd on other grounds, *United States v. Serawop, 410 F.3d 656 (10th Cir. 2005).* See generally John F. Wagner, Jr., Annotation, Who Is a "Victim," So as To Be Entitled to Restitution Under Victim and Witness Protection Act, 108 A.L.R. Fed. 828 (2005).

A few new issues will need to be litigated. For example, the Hughey case noted above conflicts with the views of Senator Jon Kyl, co-sponsor of the ***CVRA***, who explained that the definition of "victim" in the ***CVRA*** is an intentionally broad definition because "all victims of

[*858] Rule 1 also appears to be the best place to include the ***CVRA***'s language about a "representative" of a victim. This language, too, draws from the restitution statutes. [127]

Rule 2 - Fairness to Victims in Construction

The Proposal:

Rule 2 should be amended to require fairness to victims in construing the rules as follows:

These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration to the government, defendants, and victims, and to eliminate unjustifiable expense and delay.

The Rationale:

The ***CVRA*** broadly mandates that victims have the right to "be treated with fairness and with respect for the victim's dignity and privacy." [128] This creates a substantive right to fairness, similar to that found in various state victims' rights ***amendments*** - including the **[*859]** ***amendment*** found in Senator Kyl's home state of Arizona. [129] This broad reading was explained by Senator Kyl, who, along with Senators Feinstein and Hatch, was the primary legislative sponsor of the ***CVRA***: "The broad rights articulated in this section are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, fairness includes the notion of due process." [130]

In light of victims' new substantive right to fairness, Rule 2 should be amended to make clear that all of the rules must be construed to be fair to victims no less than to the government and defendants.

(New) Rule 10.1 - Notice of Proceedings for Victims

The Proposal:

A new Rule 10.1 should be added to guarantee victims their right to notice of proceedings as follows:

Rule 10.1 Notice to Victims.

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crime deserve to have their rights protected, whether or not they are the victim of the count charged." See 150 Cong. Rec. S10,910-01 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl). At least one court has suggested that, as a matter of discretion, it is desirable to notify even victims of uncharged conduct under the ***CVRA***. See *United States v. Turner, 367 F. Supp. 2d 319, 327 (E.D.N.Y. 2005)* (concluding that, absent reason to think otherwise, any person who the government asserts has been harmed by a crime or who self-identifies as such qualifies as a "victim"); cf. *In re W.R. Huff Asset Mgmt. Co., 409 F.3d 555, 561 (2d Cir. 2005)* (holding that the ***CVRA*** does not grant victims any rights against individuals not convicted of a crime, but the government can attempt to obtain voluntary restitution from such persons).

[127] See, e.g., *18 U.S.C. 3663A*(a) (same definition of victim "representative").

[128] *18 U.S.C.A. 3771*(a)(8) (West 2004 & Supp. 2005).

[129] See, e.g., Ariz. Const. art. II, 2(A)(1) (victim's right "to be treated with fairness, respect, and dignity"); see also Alaska Const. art. I, 24 (victim's right "to be treated with dignity, respect, and fairness during all phases of the criminal and juvenile justice process"); Idaho Const. art. I, 22 (victim's right "to be treated with fairness, respect, dignity and privacy throughout the criminal justice process"); Ill. Const. art. I, 8.1 (victims "to be treated with fairness and respect for their dignity"); Mich. Const. art. I, 24 (victims "to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process"); N.J. Const. art. I, P 22 (victim's right to "be treated with fairness, compassion and respect by the criminal justice system"); N.M. Const. art. II, 24 (the "right to be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process"); Ohio Const. art. I, 10a (victims "shall be accorded fairness, dignity, and respect in the criminal justice process"); Tex. Const. art. I, 30(a)(1) ("right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process"); Utah Const. art. I, 28(1)(a) (victim's right to be "treated with fairness, respect, and dignity"); Wis. Const. art. I, 9m (victim's right to be treated with "fairness, dignity and respect for their privacy"). See generally Cassell, supra note 15, at 1387-88 (discussing victims' right to fairness in Utah).

[130] 150 Cong. Rec. 4269 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

(a) Identification of Victim. During the prosecution of a case, the attorney for the government shall, at the earliest reasonable opportunity, identify the victims of the crime.
[*860]

(b) Notice of Case Events. During the prosecution of a crime, the attorney for the government shall make reasonable efforts to provide victims the earliest possible notice of:

(1) The scheduling, including scheduling changes and/or continuances, of each court proceeding that the victim is either required to attend or entitled to attend;

(2) The release or detention status of a defendant or suspected offender;

(3) The filing of charges against a defendant, or the proposed dismissal of all charges, including the placement of the defendant in a pretrial diversion program and the conditions thereon;

(4) The right to make a statement about pretrial release of the defendant;

(5) The victim's right to make a statement about acceptance of a plea of guilty or nolo contendere;

(6) The victim's right to attend public proceedings;

(7) If the defendant is convicted, the date and place set for sentencing and the victim's right to address the court at sentencing; and

(8) After the defendant is sentenced, the sentence imposed and the availability of the Bureau of Prisons notification program, which shall provide the date, if any, on which the offender will be eligible for parole or supervised release.

(c) Multiple Victims. The attorney for the government shall advise the court if the attorney believes that the number of victims makes it impracticable to provide personal notice to each victim. If the court finds that the number of victims makes it impracticable to give personal notice to each victim desiring to receive notice, the court shall fashion a reasonable procedure calculated to give reasonable notice under the circumstances.

The Rationale:

This proposed change stems from the ***CVRA***'s requirement that victims have the "right to reasonable, accurate, and timely notice of **[*861]** any public court proceeding … involving the crime." [131] Senator Feinstein explained the importance of giving victims notice:

Victims are the persons who are directly harmed by the crime and they have a stake in the criminal process because of that harm. Their lives are significantly altered by the crime and they have to live with the consequences for the rest of their lives. To deny them the opportunity to know of and be present at proceedings is counter to the fundamental principles of this country. It is simply wrong. [132]

Under the ***CVRA***, then, victims of the crime allegedly committed by the defendant [133] are entitled to notice of court proceedings. The tricky issue is who should provide that notice to victims. This responsibility must fall on prosecutors and their investigative agents for several reasons. First, prosecutors and their agents are the only parties who know the identity of the victims at the outset of the case. After a bank robbery, for example, it is the FBI agents who respond and interview the tellers.

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[131] *18 U.S.C.A. 3771*(a)(2).

[132] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein); see also id. at S4267 (statement of Sen. Kyl) ("It does not make sense to enact victims' rights that are rendered useless because the victim never knew of the proceeding at which the right had to be asserted.").

[133] See *United States v. Guevara-Toloso, 2005 U.S. Dist. LEXIS 9762 (E.D.N.Y. 2005)* (noting that ***CVRA*** requires notice to victims of the crime charged against the defendant but not notice to victims of any previous crimes the defendant may have committed).

Second, prosecutors and their agents continue dealing with victims throughout the course of a prosecution. They work with victims in investigating the crime, identifying potential defendants, preparing the indictment, and presenting evidence to the grand jury and at trial. Because of this working relationship, prosecutors are best situated to provide notice in most cases. Third, most crime victims lack legal counsel and are unfamiliar with federal criminal proceedings. They may need assistance from someone familiar with the process to understand what is happening. United States Attorneys' offices, including the victim-witness components in those offices, are well situated to provide that assistance. As the President's **[*862]** Task Force of Victims of Crime concluded, the prosecutor is "in the best position to explain to victims the legal significance of various motions and proceedings." [134] For all these reasons, prosecutors should notify victims of their rights and of upcoming hearings. [135] Most states that have addressed the issue follow this approach. [136]

The Justice Department appears to agree that it should notify victims. In the 2000 Attorney General Guidelines for Victim and Witness Assistance, the Department required prosecutors and their **[*863]** agents to provide notice to crime victims. In particular, the Guidelines currently obligate prosecutors to provide victims with "the earliest possible notice" of:

(a) The release or detention status of an offender or suspected offender … .

(b) The filing of charges against a suspected offender, or the proposed dismissal of all charges … .

(c) The scheduling, including scheduling changes and/or continuances, of each court proceeding that the victim or witness is either required to attend or entitled to attend … .

(d) The acceptance of a plea of guilty or nolo contendere or the rendering of a verdict after trial … .

(e) If the offender is convicted, the date set for sentencing, the sentence imposed … . [137]

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[134] President's Task Force on Victims of Crime, Final Report 64 (1982).

[135] But cf. *United States v. Turner, 367 F. Supp. 2d 319, 328 (E.D.N.Y. 2005)* (concluding that, in the absence of a national rule requiring prosecutors to provide notice to victims, the court would direct the prosecutor to provide the name and contact information of each victim so that the court can ensure that notice is properly given).

[136] See, e.g., *Ala. Code 15-23-62(8)* (2000) (requiring law enforcement officers to give victims initial description of their rights and "the name and telephone number of the office of the prosecuting attorney to contact for further information"); *Ariz. Rev. Stat. 13-4409* (2001) (requiring prosecutor to provide notice to victim of criminal proceedings; *Conn. Gen. Stat. Ann. 51-286e* (2000) (requiring prosecutor to notify victim of any judicial proceedings related to the case); *Del. Code Ann. tit. 11, 9411* (2001) (requiring Attorney General to provide information to victim including "notice of the scheduling of court proceedings and changes including trial date, case review and sentencing hearings"); *Ga. Code Ann. 17-17-8(b)* (2004) (requiring prosecutor where possible to give victim "prompt advance notification of any scheduled court proceedings"); *Ky. Rev. Stat. Ann. 421.500.5* (LexisNexis 1992) (requiring prosecutor to provide victim "prompt notification, if possible, of judicial proceedings relating to the case"); *Me. Rev. Stat. Ann. tit. 15, 6101* (2003) (requiring prosecutor to provide victims of certain crimes notice of any plea agreement and of trial date); *Mass. Gen. Laws Ann. ch. 258B, 3* (West 2004) (requiring prosecutor to give victims notice of various rights); *Mich. Comp. Laws Ann. 780.755(1)* (West 1998) (requiring prosecutor to give victims notice of court proceedings); *Minn. Stat. Ann. 611A.03* (West 2003) (requiring prosecutor to give victim notice of plea agreement and sentencing hearing); *N.M. Stat. Ann. 31-26-9(B)* (LexisNexis 2004) (requiring prosecutor to provide victim with notice of scheduled court proceedings); N.Y. [Executive] Law. 646a (McKinney 2005) (requiring prosecutor to provide notice of court proceedings); *S.D. Codified Laws 23A-28C-1* (2004) (requiring prosecutor to notify victim of certain hearings); *Tenn. Code Ann. 40-38-103* (2003) (requiring prosecutor to notify victim of "times, dates, and locations of all pertinent stages in the proceedings"); *Tex. Code Crim. Proc. Ann. art. 56.08(b)* (Vernon 2004) (requiring prosecutor to give victim notice of court proceedings); *Utah Code Ann. 77-38-3* (2004) (requiring prosecutor to give victim notice of "important criminal justice hearings"); *Wis. Stat. Ann. 972.14(2m)* (West 1998) ("Before pronouncing sentence, the court shall inquire of the district attorney whether he or she has complied with 971.095(2) and with sub. (3)(b), whether any of the victims of a crime considered at sentencing requested notice of the date, time and place of the sentencing hearing and, if so, whether the district attorney provided to the victim notice of the date, time and place of the sentencing hearing."); *Wyo. Stat. Ann. 1-40-204(b)(i)* (2004) (requiring prosecutor to inform victim about all hearings). But see *Ohio Rev. Code Ann. 2930.06(C)* (2005) (requiring court to give notice to victim of court proceedings).

To avoid creating only significant new responsibilities for prosecutors and their agents, the proposed new Rule 10.1 is lifted essentially verbatim from the 2000 Attorney General Guidelines for Victim and Witness Assistance. The 2005 revisions to the Guidelines continue essentially the same requirements. [138]

The drafters of the ***CVRA*** also appear to believe that the notification obligations will fall primarily on prosecutors' offices, as the ***CVRA*** authorizes an appropriation of $ 22,000,000 over the next five fiscal years to the Office for Victims of Crime of the Department of Justice for enhancement of victim notification systems. [139] **[*864]** Presumably, those enhanced new notification systems can be used to keep victims apprised of court proceedings. Moreover, the ***CVRA*** directs that the Department of Justice and its investigative agencies "shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)." [140]

Proposed new Rule 10.1 adds only two new obligations beyond those found in the 2000 Attorney General Guidelines: (1) notice to victims of their right to make a statement regarding any proposed plea, and (2) notice to victims of their right to attend public proceedings. Both of these obligations are currently found in the 2005 Guidelines. [141]

One last issue deserves brief discussion: Is it proper for the Judiciary, through the rule-making process, to command another branch of government to take certain actions? [142] The starting point for analyzing this question is the congressional command in the ***CVRA*** that the executive branch must protect victims' rights. [143] Consequently, implementing these rights through rule changes presents no question of the courts inventing new rights or exercising some kind of "supervisory" power over federal agents. [144] Instead, the implementation is simply enforcing congressionally created rights through the Judiciary's congressionally authorized rulemaking authority - an uncontroversial exercise of judicial power. [145] Moreover, in the ***CVRA***, Congress commanded the courts to "ensure that the crime victim is afforded the rights described [in the ***CVRA***]." [146] Rule changes needed to implement the ***CVRA*** thus rest **[*865]** on this statutory authority as well. Additionally, this Article's proposals affecting prosecutors are closely connected to court proceedings; they deal with such things as prosecutors notifying victims of hearings and conferring with victims in anticipation thereof. It is difficult to see new separation of powers concerns arising in such contexts so closely connected to the courtroom.

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[137] See 2000 A.G. Guidelines, supra note 38; see also U.S. Dept. of Justice, Office for Victims of Crime, New Directions from the Field: Victims' Rights and Services for the 21st Century 82 (1998) ("Prosecutors' offices should notify victims in a timely manner" of all significant hearings.).

[138] See 2005 A.G. Guidelines, supra note 38, at 27-29 (providing for notice to victims, although relying on the department's Victim Notification Systems (VNS) to do this).

[139] See ***118 Stat. 2260, 2264 (2004);*** see also 150 Cong. Rec. S4267 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) ("We authorized an appropriation of funds to assure … that moneys would be made available to enhance the victim notification system, managed by the Department of Justice's Office for Victims of Crime, and the resources additionally to develop state-of-the-art systems for notifying crime victims of important statements of development) (emphasis added). But cf. id. (discussing court notification of attorneys of record and concluding "it is a relatively simple matter to add another name and telephone number or address to that list").

[140] *18 U.S.C.A. 3771*(c)(1) (West 2004 & Supp. 2005) (emphasis added).

[141] See 2005 A.G. Guidelines, supra note 38, at 27 (prosecutors to notify victims of all their rights under the ***CVRA***).

[142] Victims cannot rely on the provisions of the Attorney General Guidelines to protect their rights because the Guidelines themselves state that they "are not intended to … and may not be relied upon to create any rights … enforceable at law by any person in a matter civil or criminal." 2005 A.G. Guidelines, supra note 38, at 27.

[143] *18 U.S.C.A. 3771*(c)(1).

[144] Cf. Sarah Sun Beale, Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, *84 Colum. L. Rev. 1433 (1984)* (discussing more problematic applications of judicial power).

[145] See *id. at 1476-77; 28 U.S.C. 2071,* 2072 (establishing court rule-making power).

[146] *18 U.S.C. 3771*(b) (emphasis added).

Furthermore, the Federal Rules of Criminal Procedure already direct executive branch actions less directly connected to court hearings. For instance, Rule 16 directs that prosecutors must turn over various discoverable items to the defendant. [147] Rule 41 directs federal agents serving a warrant to leave a copy for the person whose premises are searched. [148] And, most controversially, Rule 5 directs that federal agents making an arrest "must take the defendant without unnecessary delay" before a judicial officer. [149] The kinds of rule changes discussed in this Article are far less invasive than these commands. Finally, it should be remembered that federal prosecutors serve as "officers of the court." [150] In that capacity, the court can be reasonably expected to facilitate victims' involvement in the criminal justice process. [151] For all of these reasons, this proposed rule breaks no new ground in directing prosecutors to notify victims of courtroom proceedings.

Rule 11(a)(3) - Victims' Views on Nolo Contendere Pleas

The Proposal:

Rule 11's procedures on pleas should be revised to allow victims to express their views on any plea of nolo contendere before the court decides whether to accept it as follows:
[*866]

(a)(3) Nolo Contendere Plea. Before accepting a plea of nolo contendere, the court must consider the parties' and victims' views and the public interest in the effective administration of justice.

The Rationale:

As discussed at greater length in the immediately following sections, the ***CVRA*** gives victims the right to be heard regarding any plea, presumably including any nolo contendere plea. It is a natural corollary that the court should consider the victim's views before accepting any such plea.

Rule 11(b)(4) - Victims' Right To Be Heard on Pleas

The Proposal:

The court should address any victim present in court when taking a plea in order to determine whether the victim wishes to make a statement and to consider the victim's view before accepting a plea as follows:

(4)[cfn]Victims' Views. Before the court accepts a plea of guilty or nolo contendere or allows any plea to be withdrawn, the court must address any victim who is present personally in open court. During this address, the court must determine whether the victim wishes to present views regarding the proposed plea or withdrawal and, if so, what those views are. The court shall consider the victim's views in acting on the proposed plea or withdrawal.

The Rationale:

The ***CVRA*** gives victims the right "to be reasonably heard at any public proceeding in the district court involving … [a] plea." [152] Many states afford victims similar rights. [153] The rationale for a **[*867]** victim's right to be heard regarding a plea is to

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[147] *Fed. R. Crim. P. 16(a)(1)*.

[148] Id. at 41(f)(3).

[149] Id. at 5(a)(1). See generally, Office of Legal Policy, Report to the Att'y Gen. on the Judiciary's Use of Supervisory Power To Control Law Enforcement Action (Dec. 15, 1986), reprinted in 22 Mich. J.L. & Reform 773 (1989).

[150] See *United States v. Sells Eng., Inc., 463 U.S. 418, 466* (Burger, C.J., dissenting).

[151] See, e.g., *State v. Casey, 44 P.3d 756 (Utah 2002),* discussed infra notes 163-66 and accompanying text.

[152] *18 U.S.C.A. 3771*(a)(4) (West 2004 & Supp. 2005); see *In re Kari Ann Jacobsen, 2005 U.S. App. LEXIS 13990 (D.C. Cir. 2005)* (noting victim's right to be heard on pleas).

provide the judge with as much information as possible. The court is under no obligation to accept a plea proposed by the parties. [154] After hearing from the victim about the plea, the court can determine what weight to give to the victim's views. [155]

To implement the victim's right to be heard regarding a plea, the proposed rule change requires the court to directly address any victim present in court. This is consistent with the ***CVRA***'s legislative history that explains that "this provision is intended to allow crime victims to directly address the court in person." [156] The language of the proposed rule is lifted from an earlier paragraph in Rule 11, which requires the court to "address the defendant personally in open court" "before accepting a plea of guilty." [157] Victims should be treated even-handedly. It may be important for the judge to address victims directly because many victims will lack the assistance of counsel. As novices in legal proceedings, victims may be uncertain about exactly when in the process they should present their views. By addressing victims, the court will eliminate that uncertainty and ensure that the victim's right to be heard is vindicated.

[*868]

Rule 11(c)(1) - Prosecution To Consider Victims' Views on Pleas

The Proposal:

The prosecution should be required to consider the victims' views in developing any proposed plea arrangement as follows:

(1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. The attorney for the government shall make reasonable efforts to notify identified victims of, and consider the victims' views about, any proposed plea negotiations. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will … .

The Rationale:

The proposed change requires prosecutors to make reasonable efforts to notify victims about possible plea bargains and to consider the victim's views regarding those pleas. This requirement is taken essentially verbatim from the Attorney General Guidelines for Victim and Witness Assistance, which direct prosecutors to "make reasonable efforts to notify identified victims

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[153] See, e.g., Conn. Const. art. 1, 8 (giving victim right to be heard and to object to plea agreement); Mo. Const. art. 1, 32 (giving victim right to be heard at plea hearing); Utah Const. art. I, 28(1)(b) (giving victim the "right to be heard at important criminal justice hearings related to the victim"); *Ala. Code 15-23-71* (2000) (giving victim right to be present at plea hearing and requiring prosecutor to confer with victim about plea); *Ariz. Rev. Stat. 13-4423* (2001) (giving victim right to be present and heard at plea hearing and requiring prosecutor to confer with victim about plea); *Minn. Stat. Ann. 611A.03* (West 2003) (giving victim right to be heard at plea hearing); *Miss. Code Ann. 99-43-33* (2000) (giving victim right to make statement at plea hearing); *N.H. Rev. Stat. 21-M:8-k* (2000) (giving victim right to be heard at plea hearing); R.I. Stat. 12-28-4.1 (2000) (giving victim right to make statement at plea hearing). See generally Beloof, Cassell & Twist, supra note 15, at 476-94 (discussing victims and pleas); Sarah N. Welling, Victim Participation in Plea Bargains, 65 Wash. U. L.Q. 301 (1987).

[154] See, e.g., *United States v. Bean, 564 F.2d 700 (5th Cir. 1977).*

[155] But cf. George P. Fletcher, With Justice for Some: Victims' Rights in Criminal Trials 252, 257-58 (1995) (proposing that victims have a veto over any plea); Bennett L. Gershman, Crimes Against Victims: The Prosecutor's Duty of Neutrality, 9 Lewis & Clark L. Rev. (forthcoming 2005) (discussing situations in which victims have effectively been given a veto over pleas); Karen L. Kennard, Comment, The Victim's Veto: A Way To Increase Victim Impact on Criminal Case Dispositions, *77 Cal. L. Rev. 417, 437 (1989)* (advocating that victims be given a veto over any plea).

[156] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[157] *Fed. R. Crim. P. 11(b)(2)*.

of, and consider victims' views about, prospective plea negotiations." [158] Twenty-nine states already require prosecutors to "consult with" or "obtain the views of" victims at the plea agreement stage. [159]

The proposed rule helps to implement not only a victim's right to be heard at plea proceedings but also the right to "confer with the attorney for the Government." [160] Given that victims have the right to confer, the conferring should take place at the most salient points in the process. As Senator Feinstein explained, "This right [to confer] is intended to be expansive. For example, the victim has the **[*869]** right to confer with the Government concerning any critical stage or disposition of the case." [161] Because the overwhelming majority of federal criminal cases are resolved by a plea, a conference between the victim and the prosecutor regarding the plea will be critical in most cases. Reflecting that fact, the rules should follow the approach taken by the majority of states, directing prosecutors to consult with victims about pleas.

Rule 11(c)(2) - Court To Be Advised of Victim Objections to Plea

The Proposal:

Prosecutors (and victims' attorneys) should be required to advise the court whenever they are aware that the victim objects to a proposed plea agreement as follows:

(2) Disclosing a Plea Agreement. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera. When a plea is presented in open court, the attorney for the government or the attorney for any victim shall advise the court when the attorney is aware that the victim has any objection to the proposed plea agreement.

The Rationale:

When an attorney for the victim or for the government is aware that a victim objects to a plea, that information should be relayed to the court. In those rare cases where the victim has an attorney, the attorney will obviously raise the victim's objection. The proposed rule change clarifies the prosecutor's corresponding and equal obligation to communicate this information to the court.

The ***CVRA*** appears to obligate prosecutors to relay a victim's objection to the court, commanding them to use their "best efforts" to enforce victims' rights. [162] Part of those "best efforts" would seem to be conveying objections to the court. Victims are often untrained in the law and unexpectedly thrust into criminal proceedings; they may well believe that prosecutors automatically relay to the court **[*870]** their objections to the plea. The proposed rule avoids such confusion by requiring the prosecutor to notify the court of a victim's concern. The rule is limited to situations where the prosecutor is aware of an objection.

This approach is consistent with the instructive case of State v. Casey, [163] which considered whether a victim's objection to a plea made to a prosecutor was sufficient to trigger the victim's right to be heard under the Utah Constitution. [164] In Casey, the victim told the prosecutor that she opposed a plea arrangement. The prosecutor refused to convey the victim's concern to the

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[158] 2005 A.G. Guidelines, supra note 38, at 30 (defining what can be considered in determining whether notice is reasonable in a particular case); see also Office for Victims of Crime, supra note 137, at 75 ("Prosecutors should make every effort … to consult with the victim on the terms of any negotiated plea … .").

[159] Office for Victims of Crime, supra note 137, at 75.

[160] *18 U.S.C.A. 3771*(a)(5) (West 2004 & Supp. 2005).

[161] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[162] *18 U.S.C.A. 3771*(c).

[163] *44 P.3d 756 (Utah 2002).* I represented the victim in this case.

[164] See generally Nicole G. Farrell, Recent Case Development, *2003 Utah L. Rev. 716.*

court, and the trial judge accepted the plea. The victim then obtained legal counsel and appealed to the Utah Supreme Court, urging that under the Utah Victims' Rights ***Amendment***, her right to be heard regarding a plea had been violated. The State responded that the victim was obligated to ask the trial court directly to be heard rather than relying on the prosecutor to pass that information along. In rejecting the State's argument, the Utah Supreme Court explained that prosecutors, no less than other actors in the criminal justice system, were required to assist victims throughout the process. [165] More important for present purposes, the court also concluded that prosecutors had ethical obligations as officers of the court to convey that information to the judge:

Prosecutors must convey such requests [to be heard] because they are obligated to alert the court when they know that the court lacks relevant information. This duty, which is incumbent upon all attorneys, is magnified for prosecutors because, as our case law has repeatedly noted, prosecutors have unique responsibilities… . The prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest … in a criminal prosecution is not that it shall win … but that justice shall be done. [166]

Applying the reasoning of Casey to analogous rights in the ***CVRA***, federal prosecutors must, as officers of the court, convey a **[*871]** victim's request to be heard regarding a plea. Indeed, the prosecutor should convey not only the request to be heard but also the fact that the victim objects to the plea. In deciding whether to accept a plea, the court must consider the public interest. [167] As the Tenth Circuit has explained, ""Rule 11 also contemplates the rejection of a negotiated plea when the district court believes that bargain is too lenient, or otherwise not in the public interest.'" [168] When the prosecutor is aware of an objection from a keenly interested member of the public - the victim - the court should not be left in the dark about it.

An alternative way of drafting the rule is to require courts to inquire of prosecutors whether the victim has been advised of the proposed plea and whether the victim wishes to make a statement concerning it. [169] For example, Oregon requires the court to ask the prosecutor whether the victim has been consulted about a plea and, if so, what the victim's view is:

Before the judge accepts a plea of guilty or no contest, the judge shall ask the district attorney if the victim requested to be notified and consulted regarding plea discussions. If the victim has made such a request, the judge shall ask the district attorney if the victim agrees or disagrees with the plea discussions and agreement and the victim's reasons for agreement or disagreement. [170]

South Dakota law contains a similar requirement that prosecutors disclose "any comments" by the victim about the plea. [171] Texas law requires the court to ask the prosecutor whether a victim impact statement has been submitted; [172] if so, the court

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[165] *Casey, 44 P.3d at 763.*

[166] *Id. at 764* (internal quotations and citations omitted).

[167] See, e.g., *United States v. Bean, 564 F.2d 700 (5th Cir. 1977).*

[168] *United States v. Carrigan, 778 F.2d 1454, 1462 (10th Cir. 1985)* (emphasis added) (quoting *United States v. Miller, 722 F.2d 562, 563 (9th Cir. 1983)).*

[169] See Office for Victims of Crime, supra note 137, at 108 ("Judges should facilitate the input of crime victims into plea agreements … and they should request that prosecuting attorneys demonstrate that reasonable efforts were made to confer with the victim.").

[170] *Or. Rev. Stat. 135.406(1)(b)* (2003).

[171] *S.D. Codified Laws 23A-7-9* (2004) ("The prosecuting attorney shall disclose on the record any comments on the plea agreement made by the victim, or his designee, of the defendant's crime to the prosecuting attorney.").

[172] *Tex. Code Crim. Proc. Ann. art. 26.13(e)* (Vernon Supp. 2004) ("Before accepting a plea of guilty or a plea of nolo contendere, the court shall inquire as to whether a victim impact statement has been returned to the attorney representing the state and ask for a copy of the statement if one has been returned.").

must review that **[*872]** statement. [173] Finally, before an Arizona court accepts a plea, the prosecutor must advise the court that reasonable efforts were made to confer with the victim about the plea and the victim's view regarding it. [174]

The rule proposed here is narrower than these state formulations: it requires only that a prosecutor confer with the victim about the plea and inform the court if the victim objects. For many significant categories of federal cases (e.g., typical drug trafficking offenses, felons in possession of a firearm, etc.), there will be no victim, much less a victim objection. In such cases, to require some sort of victim inquiry by the court or victim certification by the prosecutor would unnecessarily waste time. The proposed rule requires only that the prosecutor report a victim's objection - in which case the court will presumably want to more carefully consider whether to accept a plea.

Rule 12.1 - Victim Addresses and Phone Numbers Not Disclosed for Alibi Purposes

The Proposal:

The Government currently must disclose the address and telephone numbers of any witnesses, including the victim, that it plans to use to disprove an alibi. This rule should be changed to protect the victim's privacy, excluding their information from this requirement.

(b) Disclosing Government Witnesses.

(1) Disclosure. If the defendant serves a Rule 12.1(a)(2) notice [regarding intent to present an alibi defense], an attorney for the government must disclose in writing to the defendant or the defendant's attorney:

(A) the name, address, and telephone number of each witness and the address and telephone number of each witness (other than a victim) that the government intends **[*873]** to rely on to establish the defendant's presence at the scene of the alleged offense; and

(B) each government rebuttal witness to the defendant's alibi defense

… .

(c) Continuing Duty to Disclose. Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of each additional witness, and the address and telephone number of each additional witness (other than a victim) if:

(1) the disclosing party learns of the witness before or during trial; and

(2) the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had known of the witness earlier.

In addition, a similar change should be made to Rule 12.3 regarding the addresses and telephone numbers of victims who will be used to disprove a public-authority defense.

The Rationale:

This proposed change implements the victim's right to be "reasonably protected from the accused." [175] The victim cannot be reasonably protected if the defendant, without good reason, is given the victim's address and telephone number. The proposed rule strikes the current requirement that the prosecutor must automatically give the defendant the victim's address and telephone

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[173] See id.

[174] *Ariz. Rev. Stat. Ann. 13-4423(b)(1)* (2001).

[175] *18 U.S.C.A. 3771*(a)(1) (West 2004 & Supp. 2005).

number even without any showing of need. Nothing in the rule, however, would bar the defendant from requesting that information by filing an appropriate motion. The court could then determine whether any such motion had merit. [176]

[*874]

Rule 15 - Victims' Right To Attend Pre-Trial Depositions

The Proposal:

Rule 15 should allow victims to attend any public deposition in a case as follows:

(i) Victims Can Attend. A Victim can attend any public deposition taken under this rule under the same conditions as govern a victim's attendance at trial.

The Rationale:

Victims have the right "not to be excluded from any … public court proceeding," except in rare cases where their testimony will be materially affected. [177] Depositions authorized by Rule 15 are for the purpose of preserving evidence for trial, [178] and thus are effectively an extension of the trial. Victims accordingly have the right to attend such proceedings, if public, under the same conditions governing their attendance at trial. To avoid any confusion over this issue, the proposed rule change directly states that conclusion.

Because victims can be excluded from the trial in certain rare situations where their testimony would be materially affected, [179] they can likewise be excluded from a deposition in those situations. The proposed rule simply applies the limitations on attending trial to the deposition setting by providing that the "same conditions" apply to the victim's attendance at the deposition.

[*875]

Rule 17 - Victims' Right to Notice of Subpoena of Confidential Information

The Proposal:

Rule 17 regarding subpoenas should be modified to give victims notice before personal or confidential information is subpoenaed and to allow victims to file a motion to quash such a subpoena as follows:

(h)(2) Victim Information. After indictment, no record or document containing personal or confidential information about a victim may be subpoenaed without a finding by the court that the information is relevant to trial and that compliance appears to be reasonable. If the court makes such a finding, notice shall then be given to the victim, through the attorney for the government or for the victim, before the subpoena is served. On motion made promptly by the victim, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

The Rationale:

The existing rules governing subpoenas are flawed because they allow the parties to subpoena personal or confidential information about a victim from third parties without the victim's knowledge. This issue arose recently in the Utah state

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[176] Cf. *United States v. Wills, 88 F.3d 704, 709-10 (9th Cir. 1996)* (allowing delayed disclosure of alibi witness because witness feared for safety and defendant had violent history and allowing ex parte hearing because of need to keep identity of witness from the defendant).

[177] *18 U.S.C.A. 3771*(a)(3).

[178] See, e.g., *United States v. Edwards, 69 F.3d 419, 437 (10th Cir. 1995).*

[179] *18 U.S.C.A. 3771*(a)(3), discussed infra notes 276-308 and accompanying text.

criminal proceedings involving the kidnapping of Elizabeth Smart. Elizabeth was kidnapped from her home in Salt Lake City, Utah. She was found nearly nine months later with a local transient and his wife, who had taken Elizabeth at knifepoint. [180] Attorneys for Elizabeth's alleged kidnapper subpoenaed class records from her high school - class and teacher lists, report cards, and disciplinary and attendance records - and medical records from her hospital. [181] While the hospital refused to turn over the requested records, the school willingly turned over the requested records without notice to the Smart family. Elizabeth's father learned about the subpoena only after her school records had already been turned over to defense counsel. The Smart family **[*876]** attorney then filed a motion to return the records to the school. Prosecutors in the case have objected to the fact that they were not given an opportunity to file a motion to quash. [182] The matter is still under review in state court.

The problem that occurred in the Smart case under the Utah rules could also occur under the federal rules. [183] The federal rules currently allow the witness to whom the subpoena is issued to object, [184] but there is no provision for notifying the victim when personal or confidential information has been subpoenaed from another witness.

Serving such subpoenas without notice to the victim violates the provisions of the ***CVRA*** guaranteeing victims the rights to be treated "with respect for the victim's dignity and privacy" and "with fairness." [185] Allowing subpoenas to go directly to third-party custodians of records can fail to protect privacy if the custodian is disinterested or disinclined to protect the victim's privacy. Such a scenario is not far-fetched; a third party who is subpoenaed will often have no interest in incurring legal fees to protect a victim's rights. Even if interested, third parties may not fully understand the sensitive nature of certain victim information. Victims may also have important statutory rights to protect. In the Elizabeth Smart case, for example, the school may have violated the Family Educational Rights and Privacy Act by turning over private information about Elizabeth. [186]

Subpoenas served without notice to victims may also raise constitutional concerns. [187] It is well settled that a right to privacy is implicitly incorporated within the protections guaranteed under the **[*877]** United States Constitution. The Supreme Court "has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." [188] Supreme Court precedent establishes two lines of privacy interests: (1) the "individual interest in avoiding disclosure of personal matters" and (2) "the interest in independence in making certain kinds of important decisions." [189] In essence, the right to privacy includes an individual's interest in making certain decisions that fundamentally affect his or her person "free from unwarranted governmental intrusion." [190] In light of interests such as these, several courts have held that crime victims' records - such as rape crisis counseling records - are not subject to subpoena. [191]

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[180] See generally Ed Smart & Lois Smart with Laura Morton, Bringing Elizabeth Home: A Journey of Faith and Hope (2003).

[181] Stephen Hunt, Defense Blasted for Obtaining Smart's School Records, Salt Lake Trib., Jan. 14, 2005, at B2.

[182] Pat Reavy, Quash Smart Subpoenas, DA Says, Deseret Morning News, Feb. 1, 2005, at B3.

[183] See Letter from Gregory G. Skordas, attorney for Elizabeth Smart, to Judge Susan Bucklew (May 23, 2005) (on file with author) (proposing changes to the federal rules to avoid recurrence of this problem in federal court).

[184] *Fed. R. Crim. P. 17(c)*.

[185] *18 U.S.C.A. 3771*(a)(8).

[186] Pat Reavy, Elizabeth Wants Records Returned, Deseret Morning News, Jan. 15, 2005, at B3; see *20 U.S.C. 1232g* (2000) (establishing rights of privacy in educational records).

[187] See generally Wendy J. Murphy, Using the Federal Courts To Make State Courts Respect Victims' Rights, 9 Lewis & Clark L. Rev. (forthcoming 2005) (discussing federal constitutional rights of privacy for victims' confidential records).

[188] *Roe v. Wade, 410 U.S. 113, 152 (1973).*

[189] *Whalen v. Roe, 429 U.S. 589, 599-600 (1977).*

[190] *Eisenstadt v. Baird, 405 U.S. 438, 453 (1972);* see also *Carey v. Population Servs. Int'l, 431 U.S. 678, 684-85 (1977).*

The proposed new rule protects victims' statutory and potential constitutional interests in two ways. First, the court is required to make a preliminary determination that the subpoena seeks information relevant at trial and that compliance appears to be reasonable. This is consistent with the trial court's existing power to quash unreasonable subpoenas, including subpoenas directed at crime victims. [192] Second, if the court makes a preliminary determination that the subpoena is appropriate, the victim would then receive notice of the subpoena. To avoid harassment, the notice would be provided either through the victim's own attorney or, more commonly, through the prosecutor.

The proposed rule makes no substantive change in the right of the party to obtain appropriate information through a subpoena. Instead, it merely changes procedures to ensure victims are treated fairly by having the opportunity to file a motion to quash where such **[*878]** a motion is appropriate. The court is then authorized to grant the victim's motion to quash under the same standards that already apply to other motions to quash - where compliance would be "unreasonable or oppressive." [193]

The proposed change does not interfere with the legitimate interests of the government or defendants. The change will not hamper government investigations because it applies only to subpoenas issued after indictment. Before indictment, a victim's privacy is protected through grand jury secrecy. After indictment, the only legitimate purpose for a subpoena by either the government or the defendant is to obtain testimony or evidence for trial or similar court hearing. Rule 17 does not permit a subpoena for discovery purposes, [194] although upon a proper showing a party can obtain pre-trial access to materials. [195] Therefore, when challenged by a victim on a motion to quash, the party seeking the evidence will prevail upon a proper showing that the subpoena is appropriate. The only change made by the rule, then, is to require preliminary screening by the court when confidential information is involved and give the victim the opportunity for court review in cases where legitimate interests are at stake. Constitutional interests in privacy and the victim's right to be treated "with fairness" require nothing less.

Rule 18 - Victims' Interests Considered in Setting Place of Prosecution

The Proposal:

Rule 18 should be amended to require the court to consider the convenience of victims in setting the place of prosecution as follows:

Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.
[*879]

The Rationale:

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[191] See, e.g., *State ex rel. Romley v. Superior Courts, 836 P.2d 445, 451-52 (Ariz. Ct. App. 1992)* (crime victim had the right to deny defendant access to medical records); *Commonwealth v. Wilson, 602 A.2d 1290, 1296-97 (Pa. 1992).* See generally Tera Jckowski Peterson, Distrust and Discovery: The Impending Debacle in Discovery of Rape Victims' Counseling Records in Utah, *2001 Utah L. Rev. 695;* Anna Y. Joo, Note, Broadening the Scope of Counselor-Patient Privilege To Protect the Privacy of the Sexual Assault Survivor, 32 Harv. J. on Legis. 255 (1995).

[192] See, e.g., *Amsler v. United States, 391 F.2d 37, 51 (9th Cir. 1967)* (upholding trial court's decision to quash subpoena directed to kidnapping victim's father for lack of materiality).

[193] See *Fed. R. Crim. P. 17(c)(2)*.

[194] See generally *United States v. Nixon, 418 U.S. 683, 689 (1974).*

[195] See *id. at 699.*

This change helps to implement a victim's right under the ***CVRA*** to be treated "with fairness." [196] The rule change is modest. Rule 18 already requires the court to consider the convenience of the "witnesses" in a case. In many cases, of course, the victim will be a witness. But for clarity in those cases, and to account for cases in which the victim will not be a witness, the rule should be amended to refer specifically to victims.

Rule 20 - Victims' Views Considered Regarding Consensual Transfer

The Proposal:

Rule 20 should be amended to allow the court to consider the victims' views in any decision to transfer a case as follows:

(a) Consent to Transfer. A prosecution may be transferred from the district where the indictment or information is pending, or from which a warrant on a complaint has been issued, to the district where the defendant is arrested, held, or present if:

(1) the defendant states in writing a wish to plead guilty or nolo contendere and to waive trial in the district where the indictment, information, or complaint is pending, consents in writing to the court's disposing of the case in the transferee district, and files the statement in the transferee district; and

(2) the United States attorneys in both districts approve the transfer in writing after consultation with any victim. If any victim objects to the transfer, the United States attorney in the transferring district or the victim's attorney shall advise the court where the indictment or information is pending of the victim's concerns.

A similar change should be made to Rule 20(d) regarding transfer of juvenile proceedings.

[*880]

The Rationale:

As with the previous proposal, this change implements the victim's right under the ***CVRA*** to be "treated with fairness." [197] The procedure for transferring a case for a plea is not constitutionally required, but rather is designed for the convenience of the defendant and the government. [198] In considering whether such administrative reasons justify a transfer, the concerns of the victim appropriately enter into the balance. For reasons similar to those discussed above in connection with changes regarding plea procedures, the prosecution would be directed to confer with the victim and to advise the court of any objection to the transfer. [199]

Rule 21 - Victims' Views Considered Regarding Transfer for Prejudice

The Proposal:

Rule 21 should be amended as follows to require consideration of the victim's interest in whether a case should be transferred:

(e) Victims' Views. The court shall not transfer any proceeding without giving any victim an opportunity to be heard. The court shall consider the views of the victim in making any transfer decision.

The Rationale:

Rule 21 authorizes the trial judge to transfer a case to avoid prejudice or for the convenience of the parties. The proposed rule would require that the court consider the victim's concerns in making any such transfer decision. Such consideration would seem to be part and parcel of protecting the victim's right to be "treated with fairness." In addition, the vicinage provision of

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[196] *18 U.S.C.A. 3771*(a)(8) (West 2004 & Supp. 2005).

[197] Id. 3771(a)(8).

[198] See generally Wright, Federal Practice and Procedure 321, at 357-58.

[199] See supra notes 158-174 and accompanying text.

Article III and the public's First ***Amendment*** right of access to trials give constitutional dimensions to the victim's interest in transfer decisions.

[*881] Victims may have compelling interests in observing the trial in their local community. [200] Traveling to a remote location to watch the trial may be financially difficult for many victims and impossible for indigent victims. Moreover, forcing victims to travel to distant communities alone may deprive them of the accompaniment and support of family and friends, which may be especially important when observing emotionally charged court proceedings.

Defendants, too, have the right to have cases tried locally. Under the ***Sixth Amendment***, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed … ." [201] This right might be viewed as the defendant's to assert or waive as circumstances dictate. For federal cases, however, the vicinage right is not exclusively placed in the hands of the defendant. Instead, Article III provides that "the Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes have been committed." [202]

This difference in language supports the reading that the federal provision is a structural guarantee designed to protect broader interests than the defendant's alone. [203] Moreover, the provision provides for trial in the state where the crime was committed. In most cases, this state would be where the victim resided; whether the defendant also resided in that state would be incidental.

An understanding of the Article III provision as protecting the community's interest is bolstered by the Supreme Court's decisions on right of public access to trials. In cases such as Richmond Newspapers, Inc. v. Virginia, [204] the Court has held that a guarantee of the public's right to attend trials is implicit in the First ***Amendment***. Compelling victims' interests underlie this guarantee. As the Court has explained, "the presence of interested spectators **[*882]** may keep [the defendant's] triers keenly alive to a sense of their responsibility and to the importance of their functions." [205] In addition, "public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct." [206] As Justice Blackmun has emphasized, "The victim of the crime, the family of the victim, [and] others who have suffered similarly … have an interest in observing the course of a prosecution." [207] Victims are vitally interested in observing criminal trials because society has withdrawn "both from the victim and the vigilante the enforcement of criminal laws, but [it] cannot erase from people's consciousness the fundamental, natural yearning to see justice done - or even the urge for retribution." [208] To be sure, transferring a trial to a distant city may not flatly violate the public right of access to a trial, but it can surely burden the rights of the public, including the victim, which suggests that victims ought to be heard before any such decision is made.

The Article III vicinage provision and the public right of access to trials provide constitutional underpinnings for construing the victim's rights under the ***CVRA*** to include a right to be heard on transfer proceedings. In addition, Congress has mandated that

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[200] See generally Beloof, Cassell & Twist, supra note 15, 392-99 (reviewing case law on the victim's interest in venue decisions).

[201] ***U.S. Const. amend. VI*** (emphasis added).

[202] Id. art. III, 2, cl. 3 (emphasis added).

[203] See Steven A. Engel, The Public's Vicinage Right: A Constitutional Argument, *75 N.Y.U. L. Rev. 1658, 1687 (2000);* see also Drew L. Kirshen, Vicinage, 29 Okla. L. Rev. 803 (1976).

[204] *448 U.S. 555 (1980).*

[205] *Gannett Co. v. DePasquale, 443 U.S. 368, 380 (1979)* (internal citation omitted).

[206] *Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 509 (1984).*

[207] *Gannett Co., 443 U.S. at 428* (Blackmun, J., concurring in part and dissenting in part).

[208] *Richmond Newspapers, 448 U.S. at 571.*

victims be treated with fairness. This is a broad provision intended to be broadly construed and to give victims a right to due process. As Senator Kyl has stated,

The broad rights articulated in this section are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, fairness includes the notion of due process. Too often victims of crime experience a secondary victimization at the hands of the criminal justice system. This provision is intended to direct Government agencies and employees, whether they are in executive or judicial branches, to treat victims of crime with the respect they deserve and to afford them due process. [209]

[*883] Clearly, Congress intended to afford crime victims a broad right to due process in criminal proceedings. Due process, of course, uncontroversially includes a right to be heard. [210] Thus, victims should be heard before the court makes a transfer decision.

Concluding that victims have a right to be heard on transfer decision does not mean, of course, that they will dictate the transfer decision. In some cases, the defendant will be able to establish sufficiently pervasive prejudice in a particular community to entitle him to a change of venue to protect his constitutional rights. [211] But the limited point here is that victims may provide an important perspective that the judge ought to consider in reaching a decision. Moreover, even if the judge decides to transfer a case, the victims may have valuable information for the judge on where to transfer the case to (e.g., to an adjacent state rather than a distant one).

An illustration of the general approach of the proposed rule comes from State v. Timmendequas, [212] a capital case decided by the New Jersey Supreme Court. In Timmendequas, the trial judge imported a jury from a distant community rather than force the family of a murdered young girl to travel to another district. Construing New Jersey state law provisions similar to the ***CVRA***'s, the New Jersey Supreme Court explained that the trial judge properly considered the views of the victim's family:

Over the past decade, both nationwide and in New Jersey, a significant amount of legislation has been passed implementing increased levels of protection for victims of crime. Specifically, in New Jersey, the Legislature enacted the "Crime Victim's Bill of Rights." That ***amendment*** marked the culmination of the Legislature's efforts to increase the participation of crime victims in the criminal justice system.
[*884]

The purpose of the Victim's Rights ***Amendment*** was to "enhance and protect the necessary role of crime victims and witnesses in the criminal justice process. In furtherance of [that goal], the improved treatment of these persons should be assured through the establishment of specific rights." One of the enumerated rights guaranteed for victims is "to have inconveniences associated with participation in the criminal justice process minimized to the fullest extent possible."

… .

… The [trial] court explicitly stated that it was not favoring the rights of the victims over those of defendant. Rather, it was simply taking their concerns into consideration, as it had not done previously. Taking the concerns of the victim's family into

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[209] 150 Cong. Rec. S10,910-11 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (emphases added).

[210] *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)* (acknowledging that "the fundamental requisite of due process of law is the opportunity to be heard" (quoting *Grannis v. Ordean, 234 U.S. 385, 394 (1914))).*

[211] See, e.g., *Irvin v. Dowd, 366 U.S. 717 (1961)* (holding that prisoner should have been granted change of venue where pre-trial publicity caused prejudice). But cf. Fletcher, supra note 155, at 252 (calling for abolition of a defendant's right to change venue because it "is, in effect, to accord the defense a whole peremptory challenge against the entire community").

[212] *737 A.2d 55 (N.J. 1999).*

account does not constitute error, provided that the constitutional rights of the defendant are not denied or infringed on by that decision. [213]

Just as the New Jersey courts have recognized that victims' interests should be considered in transfer decisions, the federal courts should do the same. Therefore, Rule 21 should be amended to allow victims to provide information to the judge on transfer decisions.

Rule 23 - Victims' Views Considered Regarding Non-Jury Trial

The Proposal:

The court should be required to consider the views of victims before allowing waiver of a jury trial as follows:

Rule 23. Jury or Nonjury Trial

(a) Jury Trial. If the defendant is entitled to a jury trial, the trial must be by jury unless:

(1) the defendant waives a jury trial in writing;

(2) the government consents; and

(3) the court approves after considering the views of any victims.
[*885]

The Rationale:

In the federal courts the "preferred" trial method is a jury trial. [214] As Justice Blackmun has explained, the public has interests, independent of a criminal defendant, in monitoring judges, police, and prosecutors - and in being educated about "the manner in which criminal justice is administered." [215] Nonetheless, the Supreme Court has concluded that defendants can waive their right to a jury trial. [216] To help protect the general public interest in trial by jury, Rule 23 requires not only prosecutor approval [217] but also judicial approval before proceeding by way of bench trial. This approval requires careful weighing of the competing concerns. The Supreme Court has instructed that

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[213] *Id. at 76* (internal citations omitted). The hardship to the victim was established via affidavits from the victim's family provided to the court by the prosecutor.

[214] See *Singer v. United States, 380 U.S. 24, 35 (1965)* ("Trial by jury has been established by the Constitution as the "normal and preferable mode of disposing of issues of fact in criminal cases.'" (citation omitted)). See generally Rachel E. Barkow, Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing, *152 U. Pa. L. Rev. 33, 68 (2003).*

[215] *Gannett Co. v. DePasquale, 443 U.S. 368, 428 (1979)* (Blackmun, J., dissenting in part).

[216] See *Patton v. United States, 281 U.S. 276 (1930).* But cf. Akhil Reed Amar, The Bill of Rights as a Constitution, *100 Yale L.J. 1131, 1196-98 (1991)* (mounting a strong argument against Patton and noting that before 1930 court decisions had held jury trial could not be waived).

[217] *Fed. R. Crim. P. 23(a)(2)*. But cf. Adam H. Kurland, Providing a Criminal Defendant with a Unilateral Right to a Bench Trial: A Renewed Call To Amend *Federal Rule of Criminal Procedure 23(a)*, 26 U.C. Davis L. Rev. 309 (1993) (suggesting that prosecutorial consent should be eliminated by the legislature). See generally ABA Standards for Criminal Justice 15-1.2, cmt. at 15.17 (2d ed. 1980) (concluding that arguments in favor of requiring prosecutorial approval of jury trial waivers outweigh those against).

the duty of the trial court [in considering whether to approve a jury trial waiver] is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity. [218]

This is a "serious and weighty responsibility." [219]

[*886] To discharge that serious and weighty responsibility, the trial court should receive as much information as possible. The victim is often well situated to provide information about how the public will view a non-jury trial. The proposed rule change takes the modest step of requiring the court to hear the victim before approving any non-jury trial, a step that is consistent with the ***CVRA***'s command that victims be treated with fairness.

Importantly, this change would not interfere with defendants' rights. The Supreme Court has squarely held that the defendant lacks any constitutional right to unilaterally elect a bench trial. [220] Of course, in some circumstances, despite a victim's objection, a non-jury trial nonetheless will be appropriate. Moreover, in extreme cases, the defendant may have a right to a non-jury trial where pretrial publicity has pervasively tainted the jury pool. [221] Nothing in the proposed rule change would interfere with a court's right to approve a bench trial in such circumstances, so long as the court considers the victim's perspective as part of the approval process.

Rule 32(a) - Deleting Old Definition of "Victim"

The Proposal:

The definition of "victim" currently contained in Rule 32 should be stricken as follows:

Rule 32. Sentencing and Judgment

(a) Definitions. The following definitions apply under this rule:

(1) "Crime of violence or sexual abuse" means:

(A) a crime that involves the use, attempted use, or threatened use of physical force against another's person or property; or

(B) a crime under *18 U.S.C. 2241*-2248 or 2251-2257.
[*887]

(2) "Victim" means an individual against whom the defendant committed an offense for which the court will impose sentence.

The Rationale:

The old definition of victim in Rule 32 is now too narrow, as it is limited to crimes of violence or sexual abuse. The ***CVRA***, in contrast, includes all victims within its protections. In the proposed new rules, "victim" would be defined in Rule 1. [222] Accordingly, the narrower definition found here can simply be eliminated. The Advisory Committee on Criminal Rules is well

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[218] *Patton, 281 U.S. at 312-13.*

[219] *United States v. Saadya, 750 F.2d 1419, 1421 (9th Cir. 1985)* (internal quotation omitted).

[220] *Singer v. United States, 380 U.S. 24, 36 (1965)* (finding that waiver of jury trial may be conditioned on consent of prosecutor); cf. Kurland, supra note 217, at 340-46 (urging that the rules be amended to create such a right, but not considering in any way the victim's interests involved).

[221] See *Singer, 380 U.S. at 37-38* (leaving this question open).

[222] See supra notes 120-27 and accompanying text.

aware of this issue, having withdrawn a previous proposal to expand Rule 32 to include all victims in the wake of the ***CVRA***. [223]

Rule 32(c)(1)(B) - Presentence Report Considering Restitution in All Cases

The Proposal:

Rule 32(c)(1)(B) should be amended to require that the presentence report contain restitution information in all cases as follows:

(c) Presentence Investigation.

(1) Required Investigation.

(A) In General. The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:

(i) *18 U.S.C. 3593*(c) or another statute requires otherwise; or

(ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under *18 U.S.C. 3553,* and the court explains its finding on the record.
[*888]

(B) Restitution. If the law requires permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

The Rationale:

As currently written, the rule directs that a presentence report contain information about restitution only when the law "requires" restitution. The proposed ***amendment*** directs that all presentence reports contain appropriate restitution information whenever the law "permits" restitution. If the law permits restitution, the court ought to receive information sufficient to allow it to determine whether to order such restitution. Only with such knowledge can the court appropriately exercise its discretion.

In most cases, restitution is covered by one of two federal statutes: the Mandatory Victims Restitution Act of 1996 (MVRA), [224] and its predecessor, the Victim and Witness Protection Act of 1982 (VWPA). [225] For all crimes of violence and certain crimes against property, the MVRA firmly directs that "notwithstanding any other provision of law, when sentencing a defendant convicted of [certain offenses such as crimes of violence] … the court shall order … that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate." [226] For other crimes, the earlier VWPA controls. It permits the court to order restitution in its discretion after considering various relevant factors. [227]

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[223] See Letter from Ed Carnes, Chair of the Advisory Comm. on Federal Rules of Criminal Procedure, to Hon. David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure (May 18, 2004) (on file with the author) (noting that proposed expansion of Rule 32 should be withdrawn if the ***CVRA*** was passed).

[224] *18 U.S.C. 3663A,* 3664 (2000).

[225] Id. 3663, 3664. See generally *United States v. Bedonie, 317 F. Supp. 2d 1285 (D. Utah 2004)* (discussing different statutes), rev'd on other grounds, *United States v. Serawop, 410 F.3d 656 (10th Cir. 2005).*

[226] *18 U.S.C. 3663A*(a)(1) (emphasis added); see *United States v. Monts, 311 F.3d 993, 1001 (10th Cir. 2002)* (holding that restitution under the MVRA is mandatory).

[227] *18 U.S.C. 3663A*(a)(3); see *United States v. Fountain, 768 F.2d 790, 801 (7th Cir. 1985)* (holding that restitution under the VWPA is discretionary).

In its current form, Rule 32(c)(1)(B) suggests that the probation officer is required to include restitution information only in a case covered by the MVRA because only then is restitution (in the language of the current rule) "required." [228] No sound reason exists **[*889]** for such a limitation, particularly after the enactment of the ***CVRA***. The ***CVRA*** guarantees that victims have "the right to full and timely restitution as provided in law." [229] Even when the court is proceeding under the discretionary VWPA, without appropriate information in the presentence report, the court cannot determine whether to exercise its discretion to award restitution. Therefore, the rule should be changed to require that the presentence report contain restitution information, from which the court can determine whether to make a restitution award.

(New) Rule 32(c)(3) - Probation Officer To Seek Out Victim Information

The Proposal:

The probation officer preparing a presentence report should be directed to determine whether a victim wishes to provide information for the report as follows:

(3) Victim Information. The probation officer must determine whether any victim wishes to provide information for the presentence report.

The Rationale:

Under the ***CVRA***, the victim has "the right to be reasonably heard at any public proceeding in the district court involving … sentencing … ." [230] This right clearly encompasses the victim's right to allocate, or make an oral statement at sentencing, as discussed below in connection with Rule 32(i). [231] However, the right to be "reasonably heard" also appears to include the opportunity to provide information to the probation office during preparation of the presentence report.

As Senator Kyl explained, the victim's right to be heard at sentencing should be broadly construed:
[*890]

[The ***CVRA***] provides victims the right to reasonably be heard at any public proceeding involving … sentencing. This provision is intended to allow crime victims to directly address the court in person. It is not necessary for the victim to obtain the permission of either party to do so … . When a victim invokes this right during … sentencing proceedings, it is intended that … he or she be allowed to provide all three types of victim impact: the character of the victim, the impact of the crime on the victim, the victims' family and the community, and sentencing recommendations … .

It is not the intent of the term "reasonably" in the phrase "to be reasonably heard" to provide any excuse for denying a victim the right to appear in person and directly address the court. Indeed, the very purpose of this section is to allow the victim to appear personally and directly address the court. This section would fail in its intent if courts determined that written, rather than oral communication, could generally satisfy this right. On the other hand, the term "reasonably" is meant to allow for alternative methods of communicating a victim's views to the court when the victim is unable to attend the proceedings. Such circumstances might arise, for example, if the victim is incarcerated on unrelated matters at the time of the proceedings or if a victim cannot afford to travel to a courthouse. In such cases, communication by the victim to the court is permitted by other reasonable means. [232]

In light of this legislative history, victims undoubtedly have a right to make an in-court statement at sentencing as part of their right "to be heard." But they also have the right to communicate in other ways with the court. At sentencing, an obvious

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[228] *Fed. R. Crim. P. 32(c)(1)(B)*.

[229] *18 U.S.C.A. 3771*(a)(6) (West 2004 & Supp. 2005).

[230] *18 U.S.C.A. 3771*(a)(4).

[231] See infra notes 273-75 and accompanying text.

[232] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (emphases added); see also id. (statement of Sen. Feinstein).

alternative way is via the probation officer. If there is any doubt about whether the right "to be heard" covers communications to the probation officer, the right "to be treated with fairness" comfortably covers such a requirement.

The proposed rule requires that the probation office affirmatively seek out the victim. It is unlikely that a probation officer could properly prepare a thorough presentence report without obtaining the victim's views. Indeed, the rules already require the officer to include victim information in the report. [233] Because there is no way **[*891]** to know in advance whether the victim will have relevant information for the report, the probation officer should be required to investigate that possibility. Of course, nothing in the proposed rule change would require the probation officer to include irrelevant or argumentative information in the report.

Rule 32(d)(2)(B) - Presentence Report To Contain Victim Information

The Proposal:

Rule 32(d)(2)(B) should be amended to refer directly to victims in describing the content of the presentence report and to conform to the style used for information about defendants as follows:

(2) Additional Information. The presentence report must also contain the following information:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed any victim of the crime …

The Rationale:

As discussed at the outset of this article, [234] Rule 32(d)(2)(B) typifies the victim's absence from the current federal rules by failing to use the word "victim" in describing what information belongs in a presentence report. In addition, the rule should be amended to conform to the style used in describing the presentence report's information about the defendant. The rule dealing with the **[*892]** defendant's background [235] contains no requirement that information be "verified" or stated in a "non-argumentative style." As a matter of even-handedness, no such requirement should be listed for victim information. Of course, well-trained federal probation officers will no doubt attempt to verify all information in the presentence report and phrase all of the report in a non-argumentative style. The peculiarity in the current rule is that, among the numerous subjects covered by the rules, the verification and non-argumentative style requirements apply to victim information alone.

Rule 32(e) - Prosecutor To Disclose Presentence Report to Victim

The Proposal:

The prosecutor should be required to disclose relevant parts of the presentence report to victims as follows:

(e) Disclosing the Report and Recommendation.

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[233] See supra notes 10-13 and accompanying text (discussing Rule 32(d)(2)(B)).

[234] See supra notes 10-13 and accompanying text.

[235] *Fed. R. Crim. P. 32(d)(2)(A)*.

(1) Time to Disclose. Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(2) Minimum Required Notice. The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period. The attorney for the government shall, if any victim requests, communicate the relevant contents of the presentence report to the victim.

The Rationale:

The presentence report plays a critical role in the federal sentencing process. The report contains information about the crime, the background of the defendant, the impact of the crime on the victim, and other matters relevant to sentencing. Most important, the report also contains a calculation under the Federal **[*893]** Sentencing Guidelines specifying a range for any recommended prison sentence (e.g., forty-six to fifty-seven months). While judges need not slavishly impose a sentence within this range, [236] most trial judges give significant weight to the Guidelines calculation, [237] and appellate courts have discouraged straying too far from the Guidelines without good reason. [238]

The ***CVRA*** entitles victims to be heard on disputed Guidelines issues and, as a corollary, entitles them to the right to review parts of the presentence report relevant to those issues. The ***CVRA*** gives victims "the right to be reasonably heard at any public proceeding in the district court involving … sentencing … ." [239] This codifies the right of crime victims to provide what is known as a "victim impact statement" to the court. [240] The victim's right to be heard, however, is not narrowly circumscribed to just impact information. To the contrary, the right conferred is a broad one - to be "reasonably heard" at the sentencing proceeding.

The victim's right to be "reasonably heard" is best understood as giving the victim the opportunity to speak about disputed issues regarding the Sentencing Guidelines calculation. As Senator Kyl explained, the right to be heard includes the right to make sentencing recommendations:

When a victim invokes this right [to be heard] during … sentencing proceedings, it is intended that the [sic] he or she be allowed to provide all three types of victim impact [information]: the character of the victim, **[*894]** the impact of the crime on the victim, the victim's family and the community, and sentencing recommendations. [241]

A "sentencing recommendation" will often directly implicate Guidelines issues. For example, if the victim wishes to recommend a hundred-month sentence when the maximum guideline range is only fifty-seven months, that sentencing recommendation is essentially meaningless unless a victim can provide a basis for recalculating the Guidelines or departing or varying from them. [242]

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[236] See *United States v. Booker, 125 S. Ct. 738 (2005).*

[237] See, e.g., *United States v. Wilson, 350 F. Supp. 2d 910, 912 (D. Utah 2005)* (giving "heavy weight" to Guidelines recommendation).

[238] See, e.g., *United States v. Dalton, 404 F.3d 1029 (8th Cir. 2005); United States v. Rogers, 400 F.3d 640 (8th Cir. 2005).*

[239] *18 U.S.C.A. 3771*(a)(4) (West 2004 & Supp. 2005).

[240] See generally Beloof, Cassell & Twist, supra note 15, at 625-67 (discussing victim impact statements); Paul G. Cassell, Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights ***Amendment***, *1994 Utah L. Rev. 1373, 1395-96;* cf. Dan Narled, State, Be Not Proud: A Retroactive Defense of the Commutation of Death Row and the Abolition of the Death Penalty, *40 Harv. C.R.-C.L. L. Rev. 407 (2005).*

[241] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added). See generally Beloof, Cassell & Twist, supra note 15, at ch. 10 (discussing three types of victim impact information).

[242] See *United States v. Wilson, 355 F. Supp. 2d 1269, 1272-73 (D. Utah 2005)* (discussing departures and variances from the Guidelines).

Because a victim has the right to be heard on a Guidelines issue, a victim also has the right to see the document which contains the Guidelines calculations - the presentence report. [243] Congress intended the victim's right to be heard to be construed broadly, as Senator Feinstein stated: "The victim of crime, or their counsel, should be able to provide any information, as well as their opinion, directly to the court concerning the … sentencing of the accused." [244] It is hard to see how victims can meaningfully provide "any information" that would have a bearing on the sentence without being informed of the Guidelines calculations that likely will drive the sentence and reviewing the document that underlies those calculations.

An independent basis for victims reviewing presentence reports is within the victim's broad right under the ***CVRA*** to be "treated with fairness." [245] This right easily encompasses a right of access to relevant parts of the presentence report. The victim's right to fairness gives victims a free-standing right to due process. As Senator Kyl instructed, "Of course, fairness includes the notion of due process … . **[*895]** This provision is intended to direct government agencies and employees, whether they are in the executive or judicial branches, to treat victims of crime with the respect they deserve and to afford them due process." [246] Due process principles dictate that victims have the right to be apprised of Guidelines calculations and related issues. The Supreme Court has explained that "it is … fundamental that the right to … an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner.'" [247] It is not "meaningful" for victims to make sentencing recommendations without the benefit of knowing what everyone else in that courtroom knows: the recommended Guidelines range and how that range was derived. Congress plainly intended to pass a law establishing "fair play for crime victims, meaningful participation of crime victims in the justice system, [and] protection against a government that would take from a crime victim the dignity of due process." [248] In federal sentencing today, meaningful participation means participation regarding Guidelines issues.

It is interesting that the federal law allowing appointment of a guardian ad litem for juvenile victims appears to allow for access to the presentence report. The law guarantees that, upon appointment, a guardian ad litem "may have access to all reports, evaluations and records, except attorney's work product, necessary to effectively advocate for the child." [249] In a recent federal "shaken baby" case in Arizona, a guardian for the child victim received access to the presentence report under this provision. [250] The guardian in that case found it exceedingly difficult to formulate an appropriate sentencing recommendation without access to the presentence report. After successfully gaining access to the report, she found a need to change her original recommendation. She later reported that "but for the **[*896]** disclosure, I would have ended up making a mis-informed recommendation." [251]

A victim's right to review the presentence report is also important to ensure proper restitution. Federal law guarantees most victims of serious crimes the right to restitution. [252] Reinforcing those laws, the ***CVRA*** guarantees that victims have "the right

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[243] Magistrate Judge Orenstein of the Eastern District of New York, who has written many thoughtful opinions on the ***CVRA***, has taken a contrary position. See Report and Recommendation, United States v. Ingrassis, No. CR 04-0455 at 31 (E.D.N.Y. Sept. 7, 2005) ("In the absence of any change to applicable rules or the Guidelines, the court is under no legal obligation to ensure such disclosure" of the presentence report.). For the reasons explained here, I think he takes too narrow a view of the victim's rights at sentencing.

[244] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein) (emphasis added).

[245] *18 U.S.C.A. 3771*(a)(8) (West 2004 & Supp. 2005).

[246] 150 Cong. Rec. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (emphases added).

[247] *Fuentes v. Shevin, 407 U.S. 67, 80 (1972)* (quoting *Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).*

[248] 150 Cong. Rec. S4264 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added).

[249] See *18 U.S.C. 3509*(h)(2) (2000).

[250] See United States v. James, No. CR-04-0651-PCT-JAT (D. Ariz. 2005).

[251] E-mail from Keli Luther, Arizona Voice for Victims, to Paul G. Cassell (June 20, 2005) (on file with author).

[252] See *18 U.S.C. 3663A* (Mandatory Victims Restitution Act); see also id. 3663 (Victim Witness Protection Act).

to full and timely restitution as provided in law." [253] As a practical matter, many of the calculations supporting a restitution award will rest on information in the presentence report. While the restitution statutes have their own detailed procedural provisions, [254] the presentence report is clearly a central part of the restitution process. If a presentence report fails to accurately recount restitution figures, crime victims may be short-changed. For all these reasons, the ***CVRA*** should be understood as giving victims the right to review relevant parts of the presentence report and to be heard before a court makes any final conclusions about Guidelines calculations and other sentencing issues. Many states follow a similar approach and give victims access to the presentence report. [255]

In February 2005, I testified before the Sentencing Commission to recommend a change in the U.S. Sentencing Commission Guidelines Manual along the lines of the proposals contained in this **[*897]** Article. [256] In particular, I suggested that the Commission change its current rule, which allows only the parties to see the presentence report. [257] The Practitioners' Advisory Group to the Sentencing Commission later disputed my proposal. In a letter to the Commission, [258] they argued that "nothing in the ***CVRA*** or its legislative history states that crime victims should be permitted to review portions of the presentence report, dispute guidelines calculations, raise grounds for departure, or, as such rights would seem to imply, appeal a sentence on factual or legal grounds." [259] The Practitioners' Group also cited the drafting history of the proposed constitutional ***amendment*** protecting victims' rights, which they thought was limited to giving a victim merely the right to "allocute" at sentencing - that is, merely to provide victim impact information. [260]

The Practitioners' Group's arguments are flawed for several reasons. First, the Group too narrowly views the relevant legislative history of the ***CVRA***. As explained above, Congress intended for victims to have broad rights in the sentencing process, including rights to be reasonably heard in a meaningful manner. [261] It is not reasonable to deprive victims of the critical information in the presentence report. Second, the Practioners' Group inaccurately describes the relevant history of the Victims' Rights ***Amendment***. It is true that the proposed constitutional ***amendment*** contained a right to be "reasonably heard," just as the ***CVRA*** does. However, the Practitioner's Group fails to recognize that the legislative history of the ***amendment*** suggests that

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[253] *18 U.S.C.A. 3771*(a)(6) (West 2004 & Supp. 2005).

[254] *18 U.S.C. 3664.*

[255] *Ala. Code 15-23-73* (1975) ("victim shall have the right to review a copy of the pre-sentence investigative report, subject to the applicable federal or state confidentiality laws"); *Alaska Stat. 12.55.023* (2004) (giving victim right to look at portions of sentencing report); Ariz. Const. art. 2, 2.1 (giving victim right to review presentence report when available to the defendant); *Ariz. Rev. Stat. Ann. 13-4425* (2004) (giving victim right to review presentence report "except those parts excised by the court or made confidential by law"); *Fla. Stat. Ann. 960.001* (2000) (giving victim right to review presentence report); *Idaho Code 19-5306* (2004) (giving victim right to review presentence report); Ind. Stat. Ann. 35-40-5-6(b) (2004) (giving victim right to read and "respond to" material contained in the presentence report); La. Const. art. 1, 25 (giving victim "right to review and comment upon the presentence report"); *Mont. Code Ann. 46-18-113* (2005) (giving prosecutor discretion to disclose contents of presentence report to victim); *Or. Rev. Stat. Ann. 137.077* (2003) (presentence report may be made available to victim); see also *Colo. Rev. Stat. 24-72-304(5)* (2005) (giving prosecutor discretion to allow victim or victim's family to see presentence report).

[256] See The Effect of United States v. Booker on the Federal Sentencing Guidelines: Hearing Before the U.S. Sentencing Comm'n (Feb. 15, 2005) (statement of Paul G. Cassell, United States Judge for the District of Utah), available at *http://www.ussc.gov/hearings/* 02 15 05/cassell testimony.pdf.

[257] U.S. Sentencing Comm'n, 1 Federal Sentencing Guidelines 6A1.2 (West 2004).

[258] Letter from Amy Baron-Evans & Mark Flanagan to Hon. Ricardo H. Hinojosa (Feb. 28, 2005), available at *http://sentencing.typepad.com/sentencing* law and policy/ files/pag letter.doc.

[259] Id. at 2.

[260] Id.

Congress was taking an expansive view of the victim's right to be heard at sentencing, including a view that **[*898]** would embrace a victim's right to make a specific sentencing recommendation. [262]

Most important, the Practitioners' Group's letter fails to consider the impact of denying the victim access to the presentence report on the victim's right to fairness. Presumably the Group, comprised primarily of defense attorneys, would be outraged if defendants were sentenced without receiving notice about relevant parts of the presentence report, because of the defendant's due process rights. But victims now also have due process rights during sentencing, which make it clear that they should receive the same information.

The Practitioners' Group raises one concern that can be readily dispelled. The Group wonders whether a victim's right to be heard on Guidelines issues implies a general right to appeal a sentence. It would not. The ***CVRA*** contains its own specific remedial provision, which permits victims to appeal only denials of their rights. [263] It specifically allows a victim to file a motion "to re-open … a sentence" only for violations of the victim's "right to be heard." [264] Moreover, while victims possess due process protections, due process does not guarantee a right to an appeal. [265] Finally, the Sentencing Reform Act spells out the limited rights of appeal on Guidelines issues available to only the government and the defense. [266] For all these reasons, victims have the right to review relevant parts of the **[*899]** presentence report and to be heard on Guidelines issues in the trial court, but if the court properly hears them on the Guidelines issues, victims would not have the right to appeal the sentence the court ultimately imposes.

Because victims have a right of access to the presentence report, the question arises of how to provide that access. Nothing in current law precludes releasing presentence reports to victims. While *18 U.S.C. 3552* requires disclosure to government and defense counsel, it does not forbid further dissemination. Several federal courts have held that circulation of reports to third parties is proper on a showing of particularized need approved by the court. [267] Some courts' local rules also allow additional distribution with court approval. [268] Victims always have a particularized need for access to the Guidelines calculations and

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[261] See supra notes 239-44 and accompanying text.

[262] The Group cites a 2000 Senate Judiciary Committee Report regarding the Victims' Rights ***Amendment***, which referenced a Tenth Circuit decision restricting the right of victims to present a sentencing recommendation. See Letter from Amy Baron-Evans, supra note 258 (citing S. Rep. No. 106-254, at 12 (2000) (discussing *Robinson v. Maynard, 943 F.2d 1216 (10th Cir. 1991)))*. By 2003, however, the same passage in the Senate Judiciary Committee Report was changed to remove the citation to that case and instead to cite a leading proponent of expansive rights for victims to give judges specific sentencing recommendations:

Victim impact statements concerning the character of the victim and the impact of the crime remain constitutional. See Douglas E. Beloof, Constitutional Implications of Crime Victims as Participants, *88 Cornell L. Rev. 282 (2003).* The Committee does not intend to alter or comment on laws existing in some States allowing for victim opinion as to the proper sentence.

S. Rep. No. 108-191, at 38 (2003). It is hard to see anything in this history suggesting that Congress wanted victims to be deprived of the chance to review presentence reports.

[263] *18 U.S.C.A. 3771*(d)(5) (West 2004 & Supp. 2005). See generally *In re W.R. Huff Asset Mgmt. Co., 409 F.3d 555, 561-64 (2d Cir. 2005)* (discussing appeals under ***CVRA***).

[264] *18 U.S.C.A. 3771*(d)(5).

[265] See *McKane v. Durston, 153 U.S. 684 (1894).*

[266] *18 U.S.C. 3742* (2000).

[267] See, e.g., *United States v. Corbitt, 879 F.2d 224, 238 (7th Cir. 1989)* (compelling, particularized need standard); *United States v. Schlette, 842 F.2d 1574, 1579 (9th Cir. 1988)* (interests of justice standard); *United States v. Charmer Indus., Inc., 711 F.2d 1164, 1174 (2d Cir. 1983)* (compelling need standard).

[268] See, e.g., D. Utah Crim. Local R. 32-1(c) (presentence reports not released without order of the court).

related parts of the presentence report; without such access they are unable to effectively make their sentencing recommendation.

In view of that legal landscape, there are three ways in which the Federal Rules of Criminal Procedure might deal with disclosure of the presentence reports to victims:

(1) Complete Disclosure. The rules could direct full disclosure of the presentence report to the victim. While no statute bars this approach, legitimate policy objections might be raised. Some reports may contain sensitive private information about the defendant such as results of psychiatric examinations, prior history of drug use, or childhood sexual abuse. Some reports may also reveal confidential law enforcement information that should not be widely circulated. Victims may not always need access to these parts of the report. While a number of states give victims unfettered right to access the presentence report, [269] a more limited approach seems appropriate in the federal system.

[*900] (2) Selective Disclosure. The rules could direct that the probation office redact any presentence report to remove confidential information and then provide the redacted report to the victim. This approach, too, is problematic; it would require considerable work by busy probation officers to prepare an additional document - a redacted report - presumably only after consulting with the attorneys on both sides of the case about what might be viewed as confidential.

(3) Disclosure through Prosecutors. The simplest solution to the competing concerns is to disclose the report to victims through an intermediary: the prosecutor. The prosecutor would serve as the filter for confidential information and assist the victim by highlighting critical parts of the report. Opponents might object that this approach would burden prosecutors, who are no less busy than probation officers. But the ***CVRA*** already gives victims the right to "confer" with prosecutors, [270] and presumably they will confer regarding the important topic of sentencing. Moreover, many U.S. Attorney's Offices already have Victim-Witness Coordinators who communicate with victims regarding impact statements. The ***CVRA*** also authorizes increased funding of $ 22 million for the Victim-Witness Assistance Programs in U.S. Attorney's Offices, presumably enabling those offices to expand their victim services. [271]

It might be burdensome to require that prosecutors disclose presentence reports to victims in all cases, even when they are not interested in such disclosure. Accordingly, disclosure of the report should be required only upon request of a victim.

For all those reasons, the Commission should amend the rules to give requesting victims access to presentence reports through the prosecutor. In addition, some of the aspects of preparing and disclosing presentence reports are covered in Chapter 6.A of the United States Sentencing Guidelines Manual. [272] The Manual falls within the jurisdiction of the U.S. Sentencing Commission. Accordingly, the Advisory Committee on Criminal Rules should **[*901]** coordinate with the Commission to ensure that any changes in the Criminal Rules are consistent with the provisions of the Manual.

Rule 32(f), (h), (i) - Victim Opportunity To Object to Presentence Report

The Proposal:

Rule 32(f), (h), and (i) should be amended to allow the victim to object to the presentence report as follows:

(f) Objecting to the Report.

(1) Time To Object. Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report. The attorney for the government or for the victim shall raise for the victim any reasonable objection by the victim to the presentence report.

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[269] See supra note 255.

[270] *18 U.S.C.A. 3771*(a)(5) (West 2004 & Supp. 2005).

[271] See ***118 Stat. 2260, 2264 (2004).***

[272] See supra note 257 and accompanying text.

(2) Serving Objections. An objecting party must provide a copy of its objections to the opposing party and to the probation officer.

(3) Action on Objections. After receiving objections, the probation officer may meet with the parties and the victim to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

… .

(h) Notice of Possible Departure from Sentencing Guidelines. Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission or in a victim impact statement, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure. The attorney for the government or for the victim shall advise defense counsel and the court of any ground identified by the victim that might reasonably serve as a basis for departure.

(i) Sentencing.
[*902]

(1) In General. At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of - or summarize in camera - any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys and any victims to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party or any victim to make a new objection at any time before sentence is imposed.

(2) Introducing Evidence; Producing a Statement. The court may permit the parties or the victim to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)-(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(3) Court Determinations. At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must - for any disputed portion of the presentence report or other controverted matter - rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

The Rationale:

For the reasons explained in the preceding section, the victim's right to be "reasonably heard" at a sentencing hearing encompasses the right to be heard on Sentencing Guidelines issues. Congress **[*903]** intended that the victim become a participant in the process with rights "independent of the Government or the defendant." [273] Those independent rights include

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[273] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

the opportunity to make "sentencing recommendations." [274] Given that matters in the presentence report may often determine what effect a sentencing recommendation will have, the victim's right presumably extends to participating in the process that determines the Guideline range.

The changes in Rule 32 noted above simply incorporate the victim in the Guidelines process. Changing the rule in this fashion would also clarify the appropriate sequencing of sentencing hearings. Rule 32(i) already allows the victim to submit "any information" about the sentencing. [275] Yet if the experience in my court is any guide, the victim's allocution frequently occurs only after the court has decided all the issues surrounding the presentence report. For the victim's right to provide information to the court to truly have meaning, the victim's information must be presented early enough to potentially affect critical sentencing issues, including issues about Guidelines calculations.

As with the changes discussed in the previous section, changes in the Sentencing Guidelines Manual are also required here. The Advisory Committee also should coordinate with the Sentencing Commission to ensure that its actions are consistent.

Rule 32(i)(4) - Conforming ***Amendment*** to Victims' Right To Be Heard

The Proposal:

Rule 32(i)(4) should be amended to conform the definition of victim to that found in the ***CVRA*** as follows:

(B) By a Victim. Before imposing sentence, the court must address any victim of a the crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence. Whether or not the victim is **[*904]** present, a victim's right to address the court may be exercised by the following persons if present:

(i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or

(ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated.

The Rationale:

As noted earlier, [276] Rule 32 currently contains a definition of "victim" that is narrower than the ***CVRA***'s definition. The simplest fix is simply to strike the definition of victim and victim's representative here and include an appropriate definition in Rule 1.

(New) Rule 43.1 - Victim's Right To Attend Trials

The Proposal:

A new rule implementing the victim's right to be present at trials and other proceedings should be added as follows:

Rule 43.1 Victim's Presence

(a) Victim's Right To Attend. A victim has the right to attend any public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding. Before making any determination to exclude a victim, the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision to exclude a victim shall be clearly stated on the record.

(b) Proceeding With and Without Notice. The court may proceed with a public proceeding without a victim if proper notice has been provided to that victim under Rule 10.1. The court may proceed with a public proceeding (other than a trial or sentencing)

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[274] Id.

[275] *Fed. R. Crim. P. 32(i)(4)(B)*.

[276] See discussion supra notes 120-27, 220-23 and accompanying text discussing Rules 1 and 32(a).

[*905] without proper notice to a victim only if doing so is in the interest of justice, the court provides prompt notice to that victim of the court's action and of the victim's right to seek reconsideration of the action if a victim's right is affected, and the court ensures that notice will be properly provided to that victim for all subsequent public proceedings.

(c) Numerous Victims. If the court finds that the number of victims makes it impracticable to accord all of the victims the right to be present, the court shall fashion a reasonable procedure to facilitate victims' attendance.

(d) Right To Be Heard on Victims' Issues. In addition to rights to be heard established elsewhere in these rules, at any public proceeding at which a victim has the right to attend, the victim has the right to be heard on any matter directly affecting a victim's right.

The Rationale:

The rules should reflect the ***CVRA***'s command that victims have the right to attend public proceedings in all but the most unusual circumstances. The ***CVRA*** guarantees victims the right to attend a proceeding "unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding." [277] This is a fundamental right for victims. A crime is often a very significant event in the life of a victim, and the trial, too, may be extremely important. Victims deserve to see in person whether justice is being done and should be exempted from the rule requiring trial witnesses to sit outside the courtroom. [278] The ***CVRA*** adopts this approach by

allowing crime victims, in the vast majority of cases, to attend the hearings and trial of the case involving their victimization. This is so important because crime victims share an interest with the **[*906]** government in seeing that justice is done in a criminal case and this interest supports the idea that victims should not be excluded from public criminal proceedings, whether these are pretrial, trial, or post-trial proceedings. [279]

Most states have also adopted language affirming a victim's right to attend court proceedings, including the trial. [280]

One way of addressing the victim's right to attend would be to leave the matter to the Federal Rules of Evidence. *Federal Rule of Evidence 615* - the so-called "rule on witnesses" - requires exclusion of witnesses with certain exceptions, including the fourth exception for "a person authorized by statute to be present." [281] This exception was added to cover crime victims, [282]

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[277] *18 U.S.C.A. 3771*(a)(3) (West 2004 & Supp. 2005).

[278] See generally President's Task Force on Victims of Crime, Final Report 80 (1982) (urging that victims be able to attend trial); Douglas E. Beloof & Paul G. Cassell, The Victim's Right To Attend the Trial: The Reascendant National Consensus, *9 Lewis & Clark L. Rev. 481 (2005)* (developing this argument at length).

[279] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[280] See, e.g., Ariz. Const. art. II, 2.1(A) ("To preserve and protect victims' rights to justice and due process, a victim of crime has a right: … to be present at and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present."); Colo. Const. art. II, 16a ("Any person who is a victim of a criminal act, or such person's designee, legal guardian, or surviving immediate family members if such person is deceased, shall have the right to be heard when relevant, informed, and present at all critical stages of the criminal justice process." (emphasis added)); Idaho Const. art. I, 22 ("A crime victim, as defined by statute, has the following rights: … (4) to be present at all criminal justice proceedings … .") (emphasis added); La. Const. art. I, 25 ("As defined by law, a victim of crime shall have the right to … be present … during all critical stages of preconviction … proceedings … ." (emphasis added)); Mich. Const. art. I, 24 ("Crime victims … shall have the following rights … The right to attend trial and all other court proceedings the accused has the right to attend." (emphasis added)); Miss. Const. Ann. art. III, 26A (2000) ("Victims of crime … shall have the right … to be present … when authorized by law, during public hearings." (emphasis added)); Mo. Const. art. I, 32 ("Crime victims, as defined by law, shall have the following rights … (1) the right to be present at all criminal justice proceedings at which the defendant has such right … ." (emphasis added)); *Miss. Code Ann. 99-43-21* (2000) ("The victim has the right to be present throughout all criminal proceedings as defined in Section 99-43-1." (emphasis added)). See generally Beloof & Cassell, supra note 278, (collecting all state statutes and rules pertaining to the victim's right to attend).

[281] *Fed. R. Evid. 615(4)*.

who had a right to attend trials subject to certain conditions even before the passage of the ***CVRA***. [283] Without the explicit listing of this exception, some trial courts simply overlooked the victim's right to attend - most notoriously in the Oklahoma City bombing trial. [284]

[*907] Merely relying on Rule 615 to protect the victim's right to attend proceedings, however, would be inadequate. First, the defendant's right to attend proceedings is deemed sufficiently important to merit treatment in a specific rule in the Federal Rules of Criminal Procedure - Rule 43. This proposed victim's rule, Rule 43.1, would even-handedly mirror that treatment for victims.

Second, *Federal Rule of Evidence 615* does not comprehensively address the victim's right to attend proceedings. For starters, it would seem that the Advisory Committee Notes in the Federal Rules of Evidence now need a revision to reference the ***CVRA***. Otherwise, judges, prosecutors, and defense counsel might simply be unaware that a victim is now "authorized by statute" - the ***CVRA*** - to be present. [285] Even if legal professionals realize the ***CVRA***'s ramifications, most crime victims are not lawyers and lack experience in the criminal justice system. Therefore, their rights need to be laid out in the most direct manner possible by listing their right to attend any public court proceeding in the criminal rules.

Finally, providing the details of the victim's right to attend is important for practical reasons. The ***CVRA*** qualifies the victim's right to attend by requiring exclusion in those rare cases when the victim's testimony "would be materially altered if the victim heard other testimony at that proceeding." [286] The ***CVRA***, however, contains additional procedural requirements that judges must follow before excluding a victim in such situations: "Before making a determination … [to exclude a victim], the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding." [287] Presumably, these reasonable alternatives include having the victim testify first and then watching all the following witnesses testify, [288] something judges are authorized to require. [289] The Act also requires that "the reasons for any decision denying relief under this chapter shall be clearly stated on **[*908]** the record." [290] These procedural requirements are new and potentially complex. Moreover, issues surrounding victim attendance at criminal proceedings are likely to occur frequently. Victims can appeal any exclusion order, and appellate courts must take up those appeals expeditiously. [291] Accordingly, it is important that lawyers, judges, and victims have the new rule and its procedural requirements at their fingertips, rather than being forced to dig it out through some cross-reference to the United States Code. For all these reasons, subsection (a) of the proposed rule simply tracks verbatim the substantive and procedural requirements of the ***CVRA***.

Proposed Rule 43.1(a) also limits the victim's right to attend "public" proceedings. It is clear that the ***CVRA*** intended to make no change in the circumstances in which proceedings could be closed to the public. As Senators Kyl and Feinstein explained in a colloquy regarding the law: "The Government or the defendant can request, and the court can order, judicial proceedings to

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[282] See *Fed. R. Evid. 615*, Adv. Comm. Notes, 1998 ***Amendments***.

[283] See *42 U.S.C. 10606* (1990) (replaced by the ***CVRA***).

[284] See supra notes 35-58 and accompanying text; Beloof & Cassell, supra note 278, at 514-17.

[285] The current Advisory Committee Notes reference the old Victims Rights Act, which contains a narrower formulation of the victim's right to attend than found in the ***CVRA***. See Beloof & Cassell, supra note 278, at 514-19.

[286] *18 U.S.C.A. 3771*(a)(3) (West 2004 & Supp. 2005).

[287] Id. 3771(b).

[288] See Beloof & Cassell, supra note 278, at 540-43 (discussing this approach).

[289] See *Fed. R. Evid. 611(a)* (judge controls "order" of evidence).

[290] *18 U.S.C.A. 3771*(b).

[291] Id. 3771(d)(3).

be closed under existing laws. This provision [of the ***CVRA***] is not intended to alter those laws or their procedures in any way . . . ." [292]

Proposed Rule 43.1(b) turns to the potentially complex subject of whether the court may go forward with a proceeding when the victim is not present. Of course, if the victim has been properly notified but has elected not to attend the proceeding, no problem arises. The difficult issue is what to do when the victim is absent because of lack of notice of the proceeding. It could be argued that the court has no choice but to reschedule such a proceeding, just as it would be required to reschedule a proceeding when the defendant had not received notice. The ***CVRA*** mandates that courts "shall ensure" that crime victims are accorded their rights, [293] and one of the rights is notice for court proceedings. [294] If the victim has not received notice of a proceeding, then going forward with the proceeding arguably violates the victim's rights under the ***CVRA***. As Senator Kyl explained:

[*909]

It does not make sense to enact victims' rights that are rendered useless because the victim never knew of the proceeding at which the right had to be asserted. Simply put, a failure to provide notice of proceedings at which a right can be asserted is equivalent to a violation of the right itself. [295]

Proposed Rule 43.1(b) stakes out a position more limited than an absolute requirement of proper victim notification. Except for trials and sentencings (which are discussed below), proposed Rule 43.1(b) would allow the court to move forward with a proceeding without notice to the victim provided that three conditions are met: (1) doing so is in the interests of justice, (2) the court provides prompt notice to the victim of the court's action and of the victim's right to seek reconsideration of the action if a victim's right is affected, and (3) the court ensures that notice will be properly provided to the victim for all subsequent public proceedings.

Each of these three conditions serves an important purpose. To begin with, the court should not go forward unless the interests of justice are served - the first requirement. The court should also notify the victim of the opportunity to seek reconsideration of the court's action if a victim's right is affected - the second requirement. For example, if the court holds a bail hearing without proper notice to the victim and decides to release a defendant, the victim should be advised of this fact and of the right to ask the court to reconsider that bail decision. (The ***CVRA***, as noted earlier, gives victims the right to provide information regarding bail decisions. [296]) Finally, if the court is moving forward without proper notice to a victim at a particular proceeding, it seems only fair that the problem be solved for future proceedings - the third requirement.

For two important proceedings - trial and sentencing - the proposed rule would bar a court from moving forward without proper notice to the victim. This is consistent with the ***CVRA***'s directive that "in any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights [in the ***CVRA***]." [297] If the victim has not been notified of a **[*910]** trial or sentencing, the only way the court can "ensure" that the victim's right is protected is to delay the trial or sentencing until the victim receives notice. This is entirely appropriate; a victim of a crime deserves the opportunity to see the trial of her victimizer and to speak at sentencing. A modest delay in these proceedings is a small price to pay for respecting the victim's rights. Moreover, neither a trial nor a sentencing can be repeated. Double jeopardy principles may well

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[292] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (colloquy between Sen. Kyl and Sen. Feinstein) (explaining that "in this regard, it is not our intent to alter *28 C.F.R. Sec. 50.9* in any respect").

[293] *18 U.S.C.A. 3771*(b).

[294] Id. 3771(a)(2).

[295] 150 Cong. Rec. S10,910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[296] See *18 U.S.C.A. 3771*(a)(4) (discussed at supra notes 104-10 and accompanying text).

[297] Id. 3771(b) (emphasis added).

forbid retrial even when a victim has received no notice, [298] and the ***CVRA*** itself bars a new trial remedy. [299] Sentencings would appear to be subject to limitations that might prevent a crime victim from obtaining a resentencing [300] - although the ***CVRA*** directly allows for re-sentencings in certain limited circumstances. [301]

While neither trial nor sentencing could proceed without proper notice to the victim, this restriction will affect only a small number of cases for a short period of time. Many federal cases lack a specifically identifiable victim (e.g., drug and immigration offenses) and thus are not covered by the ***CVRA***. In those cases with a victim, a significant percentage of victims may waive any right to receive notice. In cases where victims choose to receive notice, presumably the notice will be properly given the vast majority of the time. Even apart from notice requirements, most victims will be trial witnesses and therefore will have been notified of the trial by a subpoena. Victims will also often be aware of sentencings through the work of probation officers in preparing presentence reports. [302] In the tiny fraction of cases where notice has not been properly provided, notice will often be only a **[*911]** telephone call away. While the burdens of delaying a trial or sentencing are not trivial, Congress has determined that the victim's rights must take precedence. Proposed subsection (b) faithfully implements that determination.

Subsection (c) of the proposed rule deals with the victim's right to attend in situations involving multiple victims. Congress has recognized that in some cases, such as the Oklahoma City bombing case, it is impossible to afford all victims the opportunity to attend trials. Accordingly, the ***CVRA*** provides that where "the number of crime victims makes it impracticable" to protect rights for all victims, the court "shall fashion a reasonable procedure" to give effect to victims' interests. [303] Possible procedures include closed-circuit transmission of the proceedings to a ceremonial courtroom, auditorium, or other facility that can accommodate many people. To permit such transmission, an ***amendment*** to Rule 53 is proposed below. [304]

Subsection (d) gives victims a general right to be heard on issues "directly affecting" their rights. The ***CVRA*** specifically mandates that victims have the right to be heard with regard to release of the defendant, a plea, or a sentence. [305] The right to be heard at these hearings has been addressed elsewhere in these proposed rules, [306] but courts will sometimes consider other issues that directly affect victims' rights. For example, courts may consider whether to release the address and telephone number of the victim to the defendant. [307] It makes little sense for the court to decide this issue without hearing from the victim, particularly since the ***CVRA*** gives victims the right "to be reasonably protected from the accused." [308] Subsection (d)

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[298] See ***U.S. Const. amend. V***. See generally Beloof, The Third Wave of Crime Victims' Rights, supra note 16, at 303-04 (discussing double jeopardy barriers to remedying violations of victim's rights).

[299] *18 U.S.C.A. 3771*(d)(5).

[300] See *Fed. R. Crim. P. 35(c)* (correction of sentence allowed only for technical or other clear error). Whether denial of a victim's right constitutes "clear error" subject to correction presumably will need to be resolved in future cases. Cf. *United States v. Bedonie, 413 F.3d 1126 (10th Cir. 2005)* (remedying error in restitution award not permitted after imposition of sentence).

[301] *18 U.S.C.A. 3771*(d)(5) (authorizing a victim motion to "re-open a … sentence" if the victim's right to be heard was denied); see 150 Cong. Rec. S10,910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (discussing this provision). In light of these provisions, the Advisory Committee may need to consider redrafting Rule 35 to allow reopening of sentences imposed in violation of victims' rights.

[302] See supra notes 231-34 and accompanying text (discussing probation officers collecting victim information for presentence reports).

[303] *18 U.S.C.A. 3771*(d)(2).

[304] See infra notes 340-42 and accompanying text.

[305] *18 U.S.C.A. 3771*(a)(4) (discussed at supra notes 104, 230 and accompanying text).

[306] See supra note 296 and accompanying text (bail hearings); supra note 110 and accompanying text (plea hearings); supra note 275 and accompanying text (sentencing hearings).

[307] See supra notes 175-76 and accompanying text (discussing changes to Rule 12.1).

[308] *18 U.S.C.A. 3771*(a)(1).

would cover such situations by allowing victims who are present at a hearing to be heard on issues "directly" affecting their rights.

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Rule 44.1 - Discretionary Appointment of Counsel for Victim

The Proposal:

The court's discretionary authority to appoint counsel for a victim should be included in a new rule as follows:

Rule 44.1 Counsel for Victims.

When the interests of justice require, the court may appoint counsel for a victim to assist the victim in exercising his or her rights.

The Rationale:

An argument could be made that the ***CVRA*** guarantees crime victims the right to appointed counsel. After all, the ***CVRA*** guarantees victims the right to be "treated with fairness" and fairness can be understood as embracing the assistance of counsel. [309] But on closer examination, it becomes clear that nothing in the ***CVRA*** directly mandates counsel for victims. As Senator Kyl explained, "This bill does not provide victims with a right to counsel but recognizes that a victim may enlist counsel on their own." [310]

While the ***CVRA*** does not require judges to appoint counsel for victims, nothing in it prevents judges from doing so in appropriate cases, particularly under prevailing case law demonstrating that federal courts have inherent authority to make such appointments. Because this authority may not be well known to judges (or to victims), the authority should be clearly laid out in the Federal Rules of Criminal Procedure.

A number of federal courts have recognized inherent judicial authority to appoint lawyers for indigent litigants in both civil and criminal cases. [311] While these cases do not directly involve **[*913]** appointment of counsel for crime victims, their principles

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[309] Cf. *Gideon v. Wainwright, 372 U.S. 335, 344 (1963)* (discussing "fairness" to the defendant as a reason for recognizing a right to appointed counsel).

[310] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[311] See, e.g., *Powell v. Alabama, 287 U.S. 45, 73 (1932)* (holding, in a capital case, that courts have the power to appoint counsel and that "attorneys are officers of the court, and are bound to render service when required by such an appointment"); *United States v. Bertoli, 994 F.2d 1002, 1015-18 (3d Cir. 1993)* (holding that the court has inherent power to order defendant's retained law firm to remain as standby counsel at a criminal trial when defendant elects to represent himself pro se); ***United States v. Accetturo, 842 F.2d 1408, 1412-16 (3d Cir. 1988)*** (holding that courts have inherent power to appoint counsel during a criminal trial proceeding but that the power does not extend to appointing lawyers licensed in other states); *United States v. Bowe, 698 F.2d 560, 566-67 (2d Cir. 1983)* (noting that a court has inherent authority to appoint counsel for an indigent witness who may incriminate herself during testimony in a criminal case); *Williamson v. Vardeman, 674 F.2d 1211, 1212-16 (8th Cir. 1982)* (upholding a state court judge's appointment of pro bono counsel in criminal case as constitutional although noting that forcing an attorney to advance his own funds may be unconstitutional); *Tyler v. Lark, 472 F.2d 1077, 1079 (8th Cir. 1973)* (noting that in civil rights cases, "representation of indigents upon court order has been a traditional obligation of the lawyer which he assumes when he becomes a member of the bar"); *Dolan v. United States, 351 F.2d 671, 672 (5th Cir. 1965)* (holding, in a criminal case, that lawyers implicitly consent to be appointed by courts pro bono when accepting a license to practice law); *United States v. Dillon, 346 F.2d 633, 635-36 (9th Cir. 1965)* (holding, in a criminal case, that there is "an obligation on the part of the legal profession to represent indigents upon court order, without compensation"). But cf. *Colbert v. Rickmon, 747 F. Supp. 518, 527 (W.D. Ark. 1990)* (holding that courts have no inherent power to order attorneys to represent indigent clients). See generally Jerry L. Anderson, Court-Appointed Counsel: The Constitutionality of Uncompensated Conscription, 3 Geo. J. Legal Ethics 503 (1989) (discussing the trend against requiring lawyers to take uncompensated court appointments); Bruce Andrew Green, Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance, 81 Colum. L. Rev. 366 (1981) (discussing the constitutionality of pro bono court appointments); Judy E.

clearly apply to victims. Illustrative of these decisions is the thoughtful analysis by the U.S. District Court for the District of Nebraska in Bothwell v. Republic Tobacco Co. [312] Bothwell presented four grounds for its holding that courts have inherent power to appoint attorneys to represent indigent litigants:

1) courts possess the inherent power to bring to their assistance those "instruments" necessary to ensure a "fair and just" adjudicative process in individual cases; 2) in many, if not most, cases, due to the adversarial nature of our system, lawyers are a necessary component in ensuring such a "fair and just" process; 3) to a significant degree, neither the private marketplace nor public or charitable efforts provide indigent litigants with adequate access to legal assistance; and 4) to that extent, such failure threatens the reliability of the results of the adversarial process. [313]

These grounds readily apply to appointing attorneys for indigent victims when important rights under the ***CVRA*** are at stake. Without **[*914]** an attorney to press her claims, a victim may be unable to obtain a "fair and just" adjudicative process. [314] Moreover, crime victim representation appears to be a prime example of a situation where "neither the private marketplace nor public or charitable efforts provide indigent litigants with adequate access to legal assistance." [315] No financial incentive will drive lawyers to represent victims in criminal cases. [316] And while pro bono representation for victims is expanding, [317] it still falls far short of the needs of victims in the federal system. The fourth and final requirement - that the failure of attorneys to represent the indigent client threatens the reliability of the system - is also present where rights under the ***CVRA*** are at stake. Neither the prosecutor nor the defendant has a personal stake in the victim's rights, and, frequently, they will have other priorities and interests that may even be adverse to the rights of the victim. [318] Accordingly, courts have inherent authority to appoint counsel to represent indigent victims and, indeed, may even be able to require **[*915]** counsel to serve without compensation. [319] The local rules of some federal courts already explicitly recognize this power. [320]

In addition to this inherent authority, federal courts appear to possess statutory authority to make such an appointment. Title 28 broadly permits the court in both civil and criminal cases to "request an attorney to represent any person unable to afford counsel." [321] Moreover, at least one statute already directly authorizes federal courts to appoint counsel for child victims in

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Zelin, Court Appointment of Attorney To Represent, Without Compensation, Indigent in Civil Action, 52 A.L.R. 4th 1063 (1987 & Supp. 2004).

[312] *912 F. Supp. 1221 (D. Neb. 1995).*

[313] *Id. at 1229.*

[314] See generally John W. Gillis & Douglas Beloof, The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts, *33 McGeorge L. Rev. 689, 692 (2002).*

[315] *Bothwell, 912 F. Supp. at 1229.*

[316] See Gillis & Beloof, supra note 314, at 698-700.

[317] See infra note 324 and accompanying text (discussing funding in the ***CVRA*** for the National Crime Victims Law Institute and other legal clinics for victims).

[318] See Gillis & Beloof, supra note 314, at 692.

[319] See *Mallard v. U.S. Dist. Court, 490 U.S. 296, 307 & n.8 (1989)* (leaving open the question of whether federal courts possess the inherent authority to require counsel to provide legal services to the poor). Several lower courts have concluded that appointment without compensation is proper. See *Bothwell, 912 F. Supp. at 1230-34* (counsel have a duty to serve without compensation); *Family Division Trial Lawyers of the Superior Court-D.C. v. Moultrie, 725 F.2d 695, 705 (D.C. Cir. 1984)* (rejecting argument that pro bono appointment violates the Thirteenth ***Amendment*** because attorneys can take steps to avoid the pro bono appointments and holding that pro bono court appointments are not per se "takings," as accepting court ordered representation of indigents is a condition of receiving a law license, but excessive burden could present takings problem); *Williamson v. Vardeman, 674 F.2d 1211, 1211 (8th Cir. 1982)* (noting that pro bono service is a voluntary obligation undertaken by attorneys when they apply for a license to practice law); *Tyler v. Lark, 472 F.2d 1077, 1079-80 (8th Cir. 1973)* (no takings problem with appointment); *United States v. Dillon, 346 F.2d 633, 635-36 (9th Cir. 1965)* (no taking problems with appointment). But see *State ex rel. Scott v. Roper, 688 S.W.2d 757, 759-70 (Mo. 1985)* (questioning power of courts to appoint counsel without providing compensation).

certain cases. Title *18 U.S.C. 3509* provides, "The court may appoint a guardian ad litem for a child who was a victim of, or a witness to, a crime involving abuse or exploitation to protect the best interests of the child." Congress, however, has not yet provided funding for this particular right. [322] Finally, in unusual circumstances where a crime victim may also face possible criminal charges of his or her own, the Criminal Justice Act would authorize appointment of and payment for defense counsel. [323]

Proposed Rule 44.1 would confirm the existing discretionary power of the courts to appoint volunteer counsel. The rule is purely discretionary (the court "may" appoint counsel) and is limited to **[*916]** situations where the interests of justice require appointment. The rule does not address payment for counsel, as this matter must be left to subsequent appropriations from Congress. The court, however, can ask for volunteer counsel to assist victims on a pro bono basis.

There is reason to expect that some attorneys will volunteer. Not only are many attorneys willing to undertake pro bono representation, but the ***CVRA*** itself authorizes millions of dollars in funding for victim representation around the country. The authorization includes support for the National Crime Victims Law Institute at the Northwestern School of Law at Lewis and Clark College to help establish eleven legal offices around the country representing crime victims. [324]

Finally, it might be argued that it is unnecessary to address this subject in a rule because the court's inherent authority to appoint counsel exists even without a rule. Both courts and victims, however, will find it useful to have this authority spelled out in the criminal rules to eliminate any lingering doubt. In addition, the ***CVRA*** obliges prosecutors to eliminate any lingering doubt in the event of any material conflict of interest between the prosecutor and the victim by "advising the crime victim that the crime victim can seek the advice of an attorney." [325] This requirement may frequently require prosecutors to help victims obtain legal counsel. Accordingly, a separate rule on this subject is appropriate.

For all these reasons, the rules should be amended to recognize the court's authority to appoint volunteer counsel to represent a crime victim.

[*917]

Rule 46 - Victims' Right To Be Heard Regarding Defendant's Release from Custody

The Proposal:

Victims should be explicitly given the right to be heard regarding the defendant's release from custody as follows:

(k) Victims' Right To Be Heard. A victim has the right to be heard regarding any decision to release the defendant. The court shall consider the views of victims in making any release decision, including such decisions in petty cases. In a case where the court finds that the number of victims makes it impracticable to accord all of the victims the right to be heard in open court, the court shall fashion a reasonable procedure to facilitate hearing from representative victims.

The Rationale:

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[320] See, e.g., D. Utah Civ. R. 83-1.1(b)(3) (1997) ("Any attorney who is admitted to the bar of this court must agree, as a condition of such admission, to engage in a reasonable level of pro bono work when requested to do so by the court.").

[321] ***28 U.S.C. 1915***(e)(1) (2000) (emphasis added).

[322] Memorandum from the Administrative Office of the United States Courts to the United States District Court Judges and the United States Magistrate Judges (March 19, 1991) (available from the Administrative Office).

[323] See *18 U.S.C. 3006A*(a)(1).

[324] See *42 U.S.C. 10603*(d) (2000); see also 150 Cong. Rec. S4266 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (noting appropriations for the National Crime Victims Law Institution "to provide grants and assistance to lawyers to help victims of crime in court" with funding sufficient to "provide for two new regional offices and nine specific clinics"). For more information on NCVLI, see *http://www.ncvli.org*.

[325] *18 U.S.C.A. 3771*(c)(2) (West 2004 & Supp. 2005).

The ***CVRA*** guarantees victims the right "to be reasonably heard" at "any public proceeding … involving release." [326] A similar right already exists for victims of stalking offenses. [327] This proposed rule simply recognizes a victim's right "to be reasonably heard" and further directs the court to consider the victim's input. The victim's right to be heard would be meaningless if the court did not consider the victim's views. Moreover, existing law appears to recognize that the court should consider the victim's concerns. [328]

Rule 48 - Victims' Views on Dismissal To Be Considered

The Proposal:

The court should be required to consider the views of victims in deciding whether to grant a government motion to dismiss charges as follows:
[*918]

Rule 48. Dismissal

(a) By the Government. The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent. In deciding whether to grant the government's motion to dismiss, the court shall consider the views of any victims.

The Rationale:

This proposed change would implement a victim's right to be "treated with fairness" and to be heard at any proceeding "involving release" of the defendant by requiring the court to consider the views of the victim before granting a government motion to dismiss a charge. The rule already requires leave of court before a dismissal can be approved. In determining whether to grant leave, the court should consider whether dismissal is "clearly contrary to manifest public interest." [329] Among the relevant factors in making this public interest determination is whether the prosecution's motion to dismiss is motivated by "animus towards the victim." [330] The proposed rule would simply require the court to consider the views of the victim in making this determination, leaving the weight to afford those views up to the court.

Rule 50 - Victims' Right to Proceedings Free from Unreasonable Delay

The Proposal:

A victim's right to proceedings free from unreasonable delay should be recognized as follows:

Rule 50. Prompt Disposition

(a) Scheduling Preference. Scheduling preference must be given to criminal proceedings as far as practicable.
[*919]

(b) Defendant's Right Against Delay. The court shall assure that the defendant's right to a speedy trial is protected, as provided by the Speedy Trial Act.

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[326] *18 U.S.C.A. 3771*(a)(4).

[327] *18 U.S.C. 2263.*

[328] See, e.g., *18 U.S.C. 3142*(c) (court to consider whether release of the defendant "will endanger the safety of any other person").

[329] *United States v. Cowan, 524 F.2d 504, 513 (5th Cir. 1975).*

[330] *In re Richards, 213 F.3d 773, 787 (3d Cir. 2000).*

(c) Victim's Right Against Delay. The court shall assure that a victim's right to proceedings free from unreasonable delay is protected. A victim has the right to be heard regarding any motion to continue any proceeding. If the court grants a motion to continue over the objection of a victim, the court shall state its reasons in the record.

The Rationale:

Under the ***CVRA***, a victim has a right "to proceedings free from unreasonable delay." [331] A number of states have similar provisions. [332]

[*920] The proposed rule would give effect to this right. Of course, in some situations, delay is reasonable. In others, however, the court should deny a motion to continue in order to wrap up the proceedings and possibly bring closure to a victim. As Senator Feinstein has explained,

This provision does not curtail the government's need for reasonable time to organize and prosecute its case. Nor is the provision intended to infringe on the defendant's due process right to prepare a defense. Too often, however, delays in criminal proceedings occur for the mere convenience of the parties and those delays reach beyond the time needed for defendant's due process or the government's need to prepare. The result of such delays is that victims cannot begin to put the crime behind them and they continue to be victimized. It is not right to hold crime victims under the stress and pressure of future court proceedings merely because it is convenient for the parties or the court. [333]

The proposed rule gives victims a right against unreasonable delay in subsection (c). To ensure that defendants' rights are reasonably protected, a new subsection (b) is added recognizing defendants' rights in the Speedy Trial Act. [334] The existing rule's direction to give scheduling preference to criminal cases would remain in subsection (a).

The proposal also gives victims the right to be heard on any continuance. This is consistent with the drafters' intent, as at least one court has already opined. [335] As Senator Kyl stated, "This provision [in the ***CVRA***] should be interpreted so that any

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[331] *18 U.S.C.A. 3771*(a)(7). Even before the adoption of the ***CVRA***, child victims had the right to a "speedy trial" in certain situations. *18 U.S.C. 3509*(j).

[332] See, e.g., *Ariz. Rev. Stat. 13-4435* (2001) ("In any criminal proceeding in which a continuance is requested, the court shall consider the victim's views and the victim's right to a speedy trial."); *Cal. Penal Code 1050(a)* (2005) (stating policy of the California legislation that "excessive continuances … cause substantial hardship to victims and other witnesses … . It is therefore recognized that the people, the defendant, and the victims and other witnesses have the right to an expeditious disposition … ."); *Del. Code Ann. tit. 11, 9423* (2001) ("In ruling on any motion or other request for a delay or continuance … the court shall consider and give weight to any adverse impact such delay or continuance might have on the well-being of any victim … ."); *730 Ill. Comp. Stat. Ann. 5/5-4-3.1(c)* (West 2005) ("Victim shall be notified of the date and time of hearing [on any motion for continuance] and shall be provided an opportunity to address the court on the impact the continuance may have on the victim's well-being."); *La. Rev. Stat. Ann. 46:1844* (1999) ("When ruling on a defense motion for continuance, the court shall consider the impact on the victim."); *Miss. Code Ann. 99-43-19* (2000) ("The court … should make every reasonable effort to consider whether granting [a] continuance shall be prejudicial to the victim."); *R.I. Gen. Laws 11-37-11.2* (2000) ("The court shall consider any adverse impact the delay or continuance may have on the well-being of the victim … ."); *Tenn. Code 40-38-116(a)* (2003) ("In any criminal proceeding in which a continuance is requested, the court shall consider the victim's views and the victim's right to a speedy trial. If the continuance is granted over the victim's objection, the court shall state on the record the reason for the continuance and the procedures that have been taken to avoid further delays."); *Wyo. Stat. Ann. 1-40-207* (2004) ("The court shall consider the victim's interest and circumstances when … granting or denying continuances.").

Some states limit speedy trial rights to child victims. See, e.g., *Ala. Code 15-25-6* (2000) ("In ruling on any motion … for … continuance … the court shall consider and give weight to any adverse impact the delay or continuance may have on the well-being of a child victim or witness."); *Del. Code Ann. tit. 11, 5133* (2001) (same); *Idaho Code Ann. 19-110* (2004) (same); ***Ky. Rev. Stat. Ann. 421.510*** (LexisNexis 1992) (same); N.Y. Penal Law 642-a (2005) (same); *N.D. Cent. Code 12.1-35-05* (2003) (same); *Wis. Stat. 971.105* (2005) (same). For general review of the victim's right to a speedy trial, see generally Beloof, Cassell & Twist, supra note 15, at 383-91; Cassell, Balancing the Scales of Justice, supra note 15, at 1406.

[333] 150 Cong. Rec. S4268-69 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

decision to schedule, reschedule, or continue criminal cases should include victim input through the victim's assertion of the right to be free from unreasonable delay." [336]

[*921] The proposed rule also requires that the court state its reason for granting any continuance. This requirement stems from a recommendation from the President's Task Force on Victims of Crime, which noted "the inherent human tendency to postpone matters, often for insufficient reason," and accordingly recommended that "reasons for any granted continuance … be clearly stated on the record." [337] Several states have adopted similar provisions. [338]

Rule 51 - Claiming Error Regarding Victims' Rights

The Proposal:

The procedures for a victim to assert error should be spelled out in the rules as follows:

Rule 51. Preserving Claimed Error

(a) Exceptions Unnecessary. Exceptions to rulings or orders of the court are unnecessary.

(b) Preserving a Claim of Error. A party or a victim may preserve a claim of error by informing the court - when the court ruling or order is made or sought - of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party or a victim does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by *Federal Rule of Evidence 103*.

The Rationale:

The ***CVRA*** authorizes victim appeals and includes procedures for expedited handling of those appeals. [339] The proposed rule would **[*922]** incorporate victims into the existing rule regarding preservation of errors.

Rule 53 - Closed-Circuit Transmission of Proceedings for Victims

The Proposal:

Closed-circuit transmission of court proceedings for victims should be authorized as follows:

Rule 53. Courtroom Photographing and Broadcasting Prohibited

(a) General Rule. Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.

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[334] *18 U.S.C. 3161*-3174.

[335] *United States v. Turner, 367 F. Supp. 2d 319, 334 n.14 (E.D.N.Y. 2005)* (recognizing victim's "participatory right" with respect to delays in a criminal case).

[336] 150 Cong. Rec. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (emphasis added).

[337] President's Task Force on Victims of Crime, Final Report 76 (1982).

[338] See, e.g., *Ariz. Rev. Stat. Ann. 13-4435(B)* (2001) (courts required to "state on the record the reason for [any] continuance"); *Utah Code Ann. 77-38-7(3)(b)* (2004) (court required to "enter in the record the specific reason for the continuance and the procedures that have been taken to avoid further delays").

[339] See *18 U.S.C.A. 3771*(d)(3) (West 2004 & Supp. 2005).

(b) Closed-Circuit Transmission for Victims. In order to permit victims of crime to watch criminal trial proceedings, the court may authorize closed-circuit televising of the proceedings for viewing by victims or other persons the court determines have a compelling interest in doing so.

The Rationale:

The ***CVRA*** grants victims the right to attend trials, as noted previously in connection with proposed Rule 43.1. [340] At the same time, however, the ***CVRA*** recognizes that in situations with numerous victims, the court may have to craft "a reasonable procedure" to protect victims' rights. [341] One such reasonable procedure would appear to be closed-circuit transmission of court proceedings to a facility sufficiently large to accommodate all the victims. This was the procedure followed in the Oklahoma City bombing case. [342]

[*923] The proposed rule would authorize such transmission in appropriate cases. The language for the proposed rule comes from *42 U.S.C. 10608*(a), which authorizes closed-circuit transmissions "notwithstanding any provision of the Federal Rules of Criminal Procedure to the contrary" in cases in which a proceeding has been transferred more than 350 miles - as was the case with the Oklahoma City bombing trial. In light of the ***CVRA***'s mandate that the court must always craft "a reasonable procedure" to protect the rights of multiple victims, there is no compelling reason to tie the device to such geographical circumstances. The proposed rule authorizes courts to allow such transmissions in any appropriate case.

Rule 58 - Victims and Petty Offenses

The Proposal:

Courts should hear from victims regarding sentences in petty cases as follows:

Rule 58. Petty Offenses and Other Misdemeanors.

…

(3) Sentencing. The court must give the defendant an opportunity to be heard in mitigation and then proceed immediately to sentencing. The court must also give victims an opportunity to be heard. The court may, however, postpone sentencing to allow the probation service to investigate or to permit either party to submit additional information.

The Rationale:

The ***CVRA*** gives a "victim" the right to be heard at sentencing. The ***CVRA*** defines "victim" as including anyone who is directly and proximately harmed by "a Federal offense." [343] The Act does not limit those offenses to felonies or misdemeanors. Accordingly, a victim has a right to be heard at sentencing for any petty offense, as would be reflected in the proposed rule.

[*924]

Conclusion

The ***CVRA*** commands that victims be made participants in the federal criminal process and thus requires significant changes to the Federal Rules of Criminal Procedure. This Article has provided one possible and comprehensive way to implement that congressional command with specific language and supporting analysis for each change. Undoubtedly there are other ways of

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[340] See supra notes 277-308 and accompanying text.

[341] *18 U.S.C.A. 3771*(d)(2).

[342] See Paul G. Cassell & Robert F. Hoyt, The Tale of Victims' Rights, Legal Times, Dec. 23, 1996, at 32; Jo Thomas, Trial to Be Shown in Oklahoma for Victims, N.Y. Times, Jan. 30, 1997, at A14.

[343] *18 U.S.C.A. 3771*(e).

implementing the ***CVRA***. However, since the Advisory Committee will be making many decisions about how to best change the rules, one concluding thought may be worth highlighting.

Congress will be paying close attention to how courts protect the rights of future victims. Indeed, the ***CVRA*** directs the Administrative Office for the U.S. Courts to report each year the number of times that victims have attempted to assert their rights and been denied the requested relief. [344] More generally, Congress views the new Act as an important step to protecting crime victims - a "new and bolder approach, than has ever been tried before in our Federal system." [345] Congress is eagerly awaiting the results of this approach. As Senator Leahy warned, "Passage of this bill will necessitate careful oversight of its implementation by Congress." [346] Victims' advocates, too, will be watching carefully. [347]

In light of this thorough and ongoing interest, the judiciary should not merely attempt a "quick fix" or minimalist approach to implementing the ***CVRA***, but should comprehensively protect crime victims' rights by changes in court rules. If Congress believes that the federal rules fail to faithfully reflect crime victims' concerns, it can directly amend the rules. But such direct ***amendments*** may not sufficiently attend to the needs of the judicial branch or others involved in the criminal justice process. It is in that spirit of eliminating any need for congressional intervention that this Article **[*925]** offers proposals to fully and faithfully implement the congressional directive that victims be integrated into the criminal justice process.

In the final analysis, whether the courts or Congress redraft the rules is less important than that the redrafting occur. As commanded in the ***CVRA***, crime victims are now participants in federal criminal cases. That new reality must be reflected throughout the Federal Rules of Criminal Procedure.

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[344] *18 U.S.C.A. 3771,* Historical and Statutory Notes (requiring the Administrative Office of the courts to file an annual report with Congress concerning the number of times a victim's right is asserted and denied by federal courts).

[345] 150 Cong. Rec. S4263 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[346] Id. at S4271 (daily ed. Apr. 22, 2004) (statement of Sen. Leahy).

[347] *United States v. Turner, 367 F. Supp. 2d 319, 337 (E.D.N.Y. 2005)* (noting that victims' advocates "will be watching to see how federal courts and prosecutors carry out the new law's mandate").

EXHIBIT 9

Alan Dershowitz says he's still advising Jeffrey Epstein

Alan Dershowitz still provides legal advice to serial pedophile Jeffrey Epstein, he confirmed to Axios.

What he's saying: "He has called me a couple of times about legal issues, because I'm still technically his lawyer," Dershowitz told me in a phone interview on Saturday. "But I haven't had any social, or any other kind of contact. ... You never stop being a person's lawyer."

Background: Dershowitz helped Epstein get a sweetheart plea deal from then-U.S. Attorney Alexander Acosta (now Donald Trump's labor secretary and a rumored long-shot contender for attorney general).

- A bombshell Miami Herald investigative series last week highlighted for the first time the extent of Epstein's alleged crimes and the soft treatment he received from federal prosecutors.
- The Palm Beach multimillionaire would "serve just 13 months in the county jail, but the deal — called a non-prosecution agreement — essentially shut down an ongoing FBI probe into whether there were more victims and other powerful people who took part in Epstein's sex crimes," according to a Miami Herald examination of thousands of emails, court documents and FBI records.

Dozens of women alleged that Epstein molested and raped them when they were underaged using a sophisticated human trafficking network. A civil trial is scheduled to begin on Tuesday in Palm Beach County that may finally let these women tell their stories in court.

Behind the scenes: While he was allegedly raping teenage girls, Epstein cultivated cozy relationships with America's elites.

- Bill Clinton flew on Epstein's plane, nicknamed the "Lolita Express," numerous times, according to flight logs.
- And Donald Trump, in a profile with *New York* magazine written several years before the police caught up with Epstein, praised his friend as a "terrific guy." "It is even said that he likes beautiful women as much as I do," Trump said of Epstein, "and many of them are on the younger side."
- Dershowitz was also friendly with Epstein before the broader public knew he was a pedophile.

Dershowitz confirmed to me that he received a massage at Epstein's Palm Beach home, adding that the woman who provided it was of legal age.

- "What happened was I, um, he lent us, this was well before any of this thing came out, he lent us his house once. And I was there, my grandchildren were there, my daughter was there, and we all got massages."
- "And, um, it was therapeutic. I had a therapeutic massage with an old old Russian, but I never never ... and that was part of when we had his house for about a week during I think it was Christmas vacation."
- "Believe me, if I had known that anything improper had ever taken place in that house, I never would have allowed my children, my grandchildren, my wife, my daughter-in-law, my son, to have spent time there. I can tell you categorically there were no inappropriate pictures, no inappropriate anythings. It was like any other house."

One of Epstein's accusers, Virginia Roberts, has claimed Dershowitz had sex with her when she was underage. Dershowitz has denied the allegation and told the Miami Herald "the story was 100 percent flatly categorically made-up" so "she could get money."

Go deeper: Trump defender Dershowitz shunned by Martha's Vineyard

SEXUAL ASSAULT

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EXHIBIT 8

http://www.vanityfair.com/news/2003/03/jeffrey-epstein-200303

Society

The Talented Mr. Epstein

Lately, Jeffrey Epstein's high-flying style has been drawing oohs and aahs: the bachelor financier lives in New York's largest private residence, claims to take only billionaires as clients, and flies celebrities including Bill Clinton and Kevin Spacey on his Boeing 727. But pierce his air of mystery and the picture changes. Vicky Ward explores Epstein's investment career, his ties to retail magnate Leslie Wexner, and his complicated past.
by

- Vicky Ward

June 27, 2011 12:00 am

On Manhattan's Upper East Side, home to some of the most expensive real estate on earth, exists the crown jewel of the city's residential town houses. With its 15-foot-high oak door, huge arched windows, and *nine* floors, it sits on—or, rather, commands—the block of 71st Street between Fifth and Madison Avenues. Almost ludicrously out of proportion with its four- and five-story neighbors, it seems more like an institution than a house. This is perhaps not surprising—until 1989 it was the Birch Wathen private school. Now it is said to be Manhattan's largest private residence.

Inside, amid the flurry of menservants attired in sober black suits and pristine white gloves, you feel you have stumbled into someone's private Xanadu. This is no mere rich person's home, but a high-walled, eclectic, imperious fantasy that seems to have no boundaries.

The entrance hall is decorated not with paintings but with row upon row of individually framed eyeballs; these, the owner tells people with relish, were imported from England, where they were made for injured soldiers. Next comes a marble foyer, which does have a painting, in the manner of Jean Dubuffet … but the host coyly refuses to tell visitors who painted it. In any case, guests are like pygmies next to the nearby twice-life-size sculpture of a naked African warrior.

Despite its eccentricity the house is curiously impersonal, the statement of someone who wants to be known for the scale of his possessions. Its occupant, financier Jeffrey Epstein, 50, admits to friends that he likes it when people think of him this way. A good-looking man, resembling Ralph Lauren, with thick gray-white hair and a weathered face, he usually dresses in jeans, knit shirts, and loafers. He tells people he bought the house because he knew he "could never live anywhere bigger." He thinks 51,000 square feet is an appropriately large space for someone like himself, who deals mostly in large concepts—especially large sums of money.

Guests are invited to lunch or dinner at the town house—Epstein usually refers to the former as "tea," since he likes to eat bite-size morsels and drink copious quantities of Earl Grey. (He does not touch alcohol or tobacco.) Tea is served in the "leather room," so called because of the cordovan-colored fabric on the walls. The chairs are covered in a leopard print, and on the wall

hangs a huge, Oriental fantasy of a woman holding an opium pipe and caressing a snarling lionskin. Under her gaze, plates of finger sandwiches are delivered to Epstein and guests by the menservants in white gloves.

Upstairs, to the right of a spiral staircase, is the "office," an enormous gallery spanning the width of the house. Strangely, it holds no computer. Computers belong in the "computer room" (a smaller room at the back of the house), Epstein has been known to say. The office features a gilded desk (which Epstein tells people belonged to banker J. P. Morgan), 18th-century black lacquered Portuguese cabinets, and a nine-foot ebony Steinway "D" grand. On the desk, a paperback copy of the Marquis de Sade's *The Misfortunes of Virtue* was recently spotted. Covering the floor, Epstein has explained, "is the largest Persian rug you'll ever see in a private home—so big, it must have come from a mosque." Amid such splendor, much of which reflects the work of the French decorator Alberto Pinto, who has worked for Jacques Chirac and the royal families of Jordan and Saudi Arabia, there is one particularly startling oddity: a stuffed black poodle, standing atop the grand piano. "No decorator would ever tell you to do that," Epstein brags to visitors. "But I want people to think what it means to stuff a dog." People can't help but feel it's Epstein's way of saying that he always has the last word.

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In addition to the town house, Epstein lives in what is reputed to be the largest private dwelling in New Mexico, on an $18 million, 7,500-acre ranch which he named "Zorro." "It makes the town house look like a shack," Epstein has said. He also owns Little St. James, a 70-acre island in the U.S. Virgin Islands, where the main house is currently being renovated by Edward Tuttle, a designer of the Amanresorts. There is also a $6.8 million house in Palm Beach, Florida, and a fleet of aircraft: a Gulfstream IV, a helicopter, and a Boeing 727, replete with trading room, on which Epstein recently flew President Clinton, actors Chris Tucker and Kevin Spacey, supermarket magnate Ron Burkle, Lew Wasserman's grandson, Casey Wasserman, and a few others, on a mission to explore the problems of AIDS and economic development in Africa.

Epstein is charming, but he doesn't let the charm slip into his eyes. They are steely and calculating, giving some hint at the steady whir of machinery running behind them. "Let's play chess," he said to me, after refusing to give an interview for this article. "You be white. You get the first move." It was an appropriate metaphor for a man who seems to feel he can win no matter what the advantage of the other side. *His* advantage is that no one really seems to know him or his history completely or what his arsenal actually consists of. He has carefully engineered it so that he remains one of the few truly baffling mysteries among New York's moneyed world. People know snippets, but few know the whole.

"He's very enigmatic," says Rosa Monckton, the former C.E.O. of Tiffany & Co. in the U.K. and a close friend since the early 1980s. "You think you know him and then you peel off another ring of the onion skin and there's something else extraordinary underneath. He never reveals his hand…. He's a classic iceberg. What you see is not what you get."

Even acquaintances sense a curious dichotomy: Yes, he lives like a "modern maharaja," as Leah Kleman, one of his art dealers, puts it. Yet he is fastidiously, almost obsessively private—he lists

himself in the phone book under a pseudonym. He rarely attends society gatherings or weddings or funerals; he considers eating in restaurants like "eating on the subway"—i.e., something he'd never do. There are many women in his life, mostly young, but there is no one of them to whom he has been able to commit. He describes his most public companion of the last decade, Ghislaine Maxwell, 41, the daughter of the late, disgraced media baron Robert Maxwell, as simply his "best friend." He says she is not on his payroll, but she seems to organize much of his life—recently she was making telephone inquiries to find a California-based yoga instructor for him. (Epstein is still close to his two other long-term girlfriends, Paula Heil Fisher, a former associate of his at the brokerage firm Bear Stearns and now an opera producer, and Eva Andersson Dubin, a doctor and onetime model. He tells people that when a relationship is over the girlfriend "moves up, not down," to friendship status.)

Some of the businessmen who dine with him at his home—they include newspaper publisher Mort Zuckerman, banker Louis Ranieri, Revlon chairman Ronald Perelman, real-estate tycoon Leon Black, former Microsoft executive Nathan Myhrvold, Tom Pritzker (of Hyatt Hotels), and real-estate personality Donald Trump—sometimes seem not all that clear as to what he actually does to earn his millions. Certainly, you won't find Epstein's transactions written about on Bloomberg or talked about in the trading rooms. "The trading desks don't seem to know him. It's unusual for animals *that* big not to leave any footprints in the snow," says a high-level investment manager.

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Unlike such fund managers as George Soros and Stanley Druckenmiller, whose client lists and stock maneuverings act as their calling cards, Epstein keeps all his deals and clients secret, bar one client: billionaire Leslie Wexner, the respected chairman of Limited Brands. Epstein insists that ever since he left Bear Stearns in 1981 he has managed money only for billionaires—who depend on him for discretion. "I was the only person crazy enough, or arrogant enough, or misplaced enough, to make my limit a billion dollars or more," he tells people freely. According to him, the flat fees he receives from his clients, combined with his skill at playing the currency markets "with very large sums of money," have afforded him the lifestyle he enjoys today.

Why do billionaires choose him as their trustee? Because the problems of the mega-rich, he tells people, are different from yours and mine, and his unique philosophy is central to understanding those problems: "Very few people need any more money when they have a billion dollars. The key is not to have it do harm more than anything else.… You don't want to lose your money."

He has likened his job to that of an architect—more specifically, one who specializes in remodeling: "I always describe [a billionaire] as someone who started out in a small home and as he became wealthier had add-ons. He added on another addition, he built a room over the garage … until you have a house that is usually a mess.… It's a large house that has been put together over time where no one could foretell the financial future and their accompanying needs."

He makes it sound as though his job combines the roles of real-estate agent, accountant, lawyer, money manager, trustee, and confidant. But, as with Jay Gatsby, myths and rumor swirl around Epstein.

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Here are some of the hard facts about Epstein—ones that he doesn't mind people knowing: He grew up middle-class in Brooklyn. His father worked for the city's parks department. His parents viewed education as "the way out" for him and his younger brother, Mark, now working in real estate. Jeffrey started to play the piano—for which he maintains a passion—at five, and he went to Brooklyn's Lafayette High School. He was good at mathematics, and in his early 20s he got a job teaching physics and math at Dalton, the elite Manhattan private school. While there he began tutoring the son of Bear Stearns chairman Ace Greenberg and was friendly with a daughter of Greenberg's. Soon he went to Bear Stearns, where, under the mentorship of both Greenberg and current Bear Stearns C.E.O. James Cayne, he did well enough to become a limited partner—a rung beneath full partner. He abruptly departed in 1981 because, he has said, he wanted to run his own business.

Thereafter the details recede into shadow. A few of the handful of current friends who have known him since the early 1980s recall that he used to tell them he was a "bounty hunter," recovering lost or stolen money for the government or for very rich people. He has a license to carry a firearm. For the last 15 years, he's been running his business, J. Epstein & Co.

Since Leslie Wexner appeared in his life—Epstein has said this was in 1986; others say it was in 1989, at the earliest—he has gradually, in a way that has not generally made headlines, come to be accepted by the Establishment. He's a member of various commissions and councils: he is on the Trilateral Commission, the Council on Foreign Relations, the New York Academy of Sciences, and the Institute of International Education.

His current fan club extends to Cayne, Henry Rosovsky, the former dean of Harvard's Faculty of Arts and Sciences, and Larry Summers, Harvard's current president. Harvard law professor Alan Dershowitz says, "I'm on my 20th book…. The only person outside of my immediate family that I send drafts to is Jeffrey." Real-estate developer and philanthropist Marshall Rose, who has worked with Epstein on projects in New Albany, Ohio, for Wexner, says, "He digests and decodes the information very rapidly, which is to me terrific because we have shorter meetings."

Also on the list of admirers are former senator George Mitchell and a gaggle of distinguished scientists, most of whom Epstein has helped fund in recent years. They include Nobel Prize winners Gerald Edelman and Murray Gell-Mann, and mathematical biologist Martin Nowak. When these men describe Epstein, they talk about "energy" and "curiosity," as well as a love for theoretical physics that they don't ordinarily find in laymen. Gell-Mann rather sweetly mentions that "there are always pretty ladies around" when he goes to dinner *chez* Epstein, and he's under the impression that Epstein's clients include the Queen of England. Both Nowak and Dershowitz were thrilled to find themselves shaking the hand of a man named "Andrew" in Epstein's house. "Andrew" turned out to be Prince Andrew, who subsequently arranged to sit in the back of Dershowitz's law class.

Epstein gets annoyed when anyone suggests that Wexner "made him." "I had really rich clients before," he has said. Yet he does not deny that he and Wexner have a special relationship. Epstein sees it as a partnership of equals. "People have said it's like we have one brain between two of us: each has a side."

"I think we both possess the skill of seeing patterns," says Wexner. "But Jeffrey sees patterns in politics and financial markets, and I see patterns in lifestyle and fashion trends. My skills are not in investment strategy, and, as everyone who knows Jeffrey knows, his are not in fashion and design. We frequently discuss world trends as each of us sees them."

By the time Epstein met Wexner, the latter was a retail legend who had built a $3 billion empire—one that now includes Victoria's Secret, Express, and Bath & Body Works—from $5,000 lent him by his aunt. "Wexner saw in Jeffrey the type of person who had the potential to realize his [Jeffrey's] dreams," says someone who has worked closely with both men. "He gave Jeffrey the ball, and Jeffrey hit it out of the park."

Wexner, through a trust, bought the town house in which Epstein now lives for a reported $13.2 million in 1989. In 1993, Wexner married Abigail Koppel, a 31-year-old lawyer, and the newlyweds relocated to Ohio; in 1996, Epstein moved into the town house. Public documents suggest that the house is still owned by the trust that bought it, but Epstein has said that he now owns the house.

Wexner trusts Epstein so completely that he has assigned him the power of fiduciary over all of his private trusts and foundations, says a source close to Wexner. In 1992, Epstein even persuaded Wexner to put him on the board of the Wexner Foundation in place of Wexner's ailing mother. Bella Wexner recovered and demanded to be reinstated. Epstein has said they settled by splitting the foundation in two.

Epstein does not care that he comes between family members. In fact, he sees it as his job. He tells people, "I am there to represent my client, and if my client needs protecting—sometimes even from his own family—then it's often better that people hate me, not the client."

"You've probably heard I'm vicious in my representation of my clients," he tells people proudly; Leah Kleman describes his haggling over art prices as something like a scene out of the movie *Mad Max: Beyond Thunderdome.* Even a former mentor says he's seen "the dark side" of Epstein, and a Bear Stearns source recalls a meeting in which Epstein chewed out a team making a presentation for Wexner as being so brutal as to be "irresponsible."

One reporter, in fact, received three threats from Epstein while preparing a piece. They were delivered in a jocular tone, but the message was clear: There will be trouble for your family if I don't like the article.

On the other hand, Epstein is clearly very generous with friends. Joe Pagano, an Aspen-based venture capitalist, who has known Epstein since before his Bear Stearns days, can't say enough nice things: "I have a boy who's dyslexic, and Jeffrey's gotten close to him over the years…. Jeffrey got him into music. He bought him his first piano. And then as he got to school he had difficulty … in studying … so Jeffrey got him interested in taking flying lessons."

Rosa Monckton recalls Epstein telling her that her daughter, Domenica, who suffers from Down syndrome, needed the sun, and that Rosa should feel free to bring her to his house in Palm Beach anytime.

Some friends remember that in the late 80s Epstein would offer to upgrade the airline tickets of good friends by affixing first-class stickers; the only problem was that the stickers turned out to be unofficial. Sometimes the technique worked, but other times it didn't, and the unwitting recipients found themselves exiled to coach. (Epstein has claimed that he paid for the upgrades, and had no knowledge of the stickers.) Many of those who benefited from Epstein's largesse claim that his generosity comes with no strings attached. "I never felt he wanted anything from me in return," says one old friend, who received a first-class upgrade.

Epstein is known about town as a man who loves women—lots of them, mostly young. Model types have been heard saying they are full of gratitude to Epstein for flying them around, and he is a familiar face to many of the Victoria's Secret girls. One young woman recalls being summoned by Ghislaine Maxwell to a concert at Epstein's town house, where the women seemed to outnumber the men by far. "These were not women you'd see at Upper East Side dinners," the woman recalls. "Many seemed foreign and dressed a little bizarrely." This same guest also attended a cocktail party thrown by Maxwell that Prince Andrew attended, which was filled, she says, with young Russian models. "Some of the guests were horrified," the woman says.

"He's reckless," says a former business associate, "and he's gotten more so. Money does that to you. He's breaking the oath he made to himself—that he would never do anything that would expose him in the media. Right now, in the wake of the publicity following his trip with Clinton, he must be in a very difficult place."

According to S.E.C. and other legal documents unearthed by *VANITY FAIR,* Epstein may have good reason to keep his past cloaked in secrecy: his real mentor, it might seem, was not Leslie Wexner but Steven Jude Hoffenberg, 57, who, for a few months before the S.E.C. sued to freeze his assets in 1993, was trying to buy the *New York Post.* He is currently incarcerated in the Federal Medical Center in Devens, Massachusetts, serving a 20-year sentence for bilking investors out of more than $450 million in one of the largest Ponzi schemes in American history.

When Epstein met Hoffenberg in London in the 1980s, the latter was the charismatic, audacious head of the Towers Financial Corporation, a collection agency that was supposed to buy debts that people owed to hospitals, banks, and phone companies. But Hoffenberg began using company funds to pay off earlier investors and service a lavish lifestyle that included a mansion on Long Island, homes on Manhattan's Sutton Place and in Florida, and a fleet of cars and planes.

Hoffenberg and Epstein had much in common. Both were smart and obsessed with making money. Both were from Brooklyn. According to Hoffenberg, the two men were introduced by Douglas Leese, a defense contractor. Epstein has said they were introduced by John Mitchell, the late attorney general.

Epstein had been running International Assets Group Inc. (I.A.G.), a consulting company, out of his apartment in the Solo building on East 66th Street in New York. Though he has claimed that he managed money for billionaires only, in a 1989 deposition he testified that he spent 80 percent of his time assisting people recover stolen money from fraudulent brokers and lawyers.

He was also not above entering into risky, tax-sheltered oil and gas deals with much smaller investors. A lawsuit that Michael Stroll, the former head of Williams Electronics Inc., filed against Epstein shows that in 1982 I.A.G. received an investment from Stroll of $450,000, which Epstein put into oil. In 1984 Stroll asked for his money back; four years later he had received only $10,000. Stroll lost the suit, after Epstein claimed in court, among other things, that the check for $10,000 was for a horse he'd bought from Stroll. "My net worth never exceeded four and a half million dollars," Stroll has said.

Hoffenberg, says a close friend, "really liked Jeffrey…. Jeffrey has a way of getting under your skin, and he was under Hoffenberg's." Also appealing to Hoffenberg were Epstein's social connections; they included oil mogul Cece Wang (father of the designer Vera) and Mohan Murjani, whose clothing company grew into Gloria Vanderbilt Jeans. Epstein lived large even then. One friend recalls that when he took Canadian heiress Wendy Belzberg on a date he hired a Rolls-Royce especially for the occasion. (Epstein has claimed he owned it.)

In 1987, Hoffenberg, according to sources, set Epstein up in the offices he still occupies in the Villard House, on Madison Avenue, across a courtyard from the restaurant Le Cirque. Hoffenberg hired his new protégé as a consultant at $25,000 a month, and the relationship flourished. "They traveled everywhere together—on Hoffenberg's plane, all around the world, they were always together," says a source. Hoffenberg has claimed that Epstein confided in him, saying, for example, that he had left Bear Stearns in 1981 after he was discovered executing "illegal operations."

Several of Epstein's Bear Stearns contemporaries recall that Epstein left the company very suddenly. Within the company there were rumors also that he was involved in a technical infringement, and it was thought that the executive committee asked that he resign after his two supporters, Ace Greenberg and Jimmy Cayne, were outnumbered. Greenberg says he can't recall this; Cayne denies it happened, and Epstein has denied it as well. "Jeffrey Epstein left Bear Stearns of his own volition," says Cayne. "It was never suggested that he leave by any member of management, and management never looked into any improprieties by him. Jeffrey said specifically, 'I don't want to work for anybody else. I want to work for myself.'" Yet, this is not the story that Epstein told to the S.E.C. in 1981 and to lawyers in a 1989 deposition involving a civil business case in Philadelphia.

In 1981 the S.E.C.'s Jonathan Harris and Robert Blackburn took Epstein's testimony and that of other Bear Stearns employees in part of what became a protracted case about insider trading around a tender offer placed on March 11, 1981, by the Seagram Company Ltd. for St. Joe Minerals Corp. Ultimately several Italian and Swiss investors were found guilty, including Italian financier Giuseppe Tome, who had used his relationship with Seagram owner Edgar Bronfman Sr. to obtain information about the tender offer.

After the tender offer was announced, the S.E.C. began investigating trades involving St. Joe at Bear Stearns and other firms. Epstein resigned from Bear Stearns on March 12. The S.E.C. was tipped off that Epstein had information on insider trading at Bear Stearns, and it was therefore obliged to question him. In his S.E.C. testimony, given on April 1, 1981, Epstein claimed that he had found "offensive" the way Bear Stearns management had handled a disciplinary action

following its discovery that he had committed a possible "Reg D" violation—evidently he had lent money to his closest friend. (In the 1989 deposition he said that he'd lent approximately $20,000 to Warren Eisenstein, to buy stock.) Such an action could have been considered improper, although Epstein claimed he had not realized this until afterward.

According to Epstein, Bear Stearns management had questioned him about the loan around March 4. The questioners, Epstein said, were Michael (Mickey) Tarnopol and Alvin Einbender. In his 1989 deposition Epstein recalled that the partner who had made an "issue" of the matter was Marvin Davidson. On March 9, Epstein said, he had met with Tarnopol and Einbender again, and the two partners told him that the executive committee had weighed the offense, together with previous "carelessness" over expenses, and he would be fined $2,500.

"There was discussion whether, in fact, I had ever put in an airline ticket for someone else and not myself and I said that it was possible, … since my secretary handles my expenses," Epstein told the S.E.C. In his 1989 testimony he stated that the "Reg D" incident had cost him a shot at partnership that year.

What the S.E.C. seemed to be especially interested in was whether there was a connection between Epstein's leaving and the alleged insider trading in St. Joe Minerals by other people at Bear Stearns:

Q: Sir, are you aware that certain rumors may have been circulating around your firm in connection with your reasons for leaving the firm?

A: I'm aware that there were many rumors.

Q: What were the rumors you heard?

A: Nothing to do with St. Joe.

Q: Can you relate what you heard?

A: It was having to do with an illicit affair with a secretary.

Q: Have you heard any other rumors suggesting that you had made a presentation or communication to the Executive Committee concerning alleged improprieties by other members or employees of Bear Stearns?

A: I, in fact, have heard that rumor, but it's been from Mr. Harris in our conversation last week.

Q: Have you heard it from anyone else?

A: No.

A little later the interview focuses on James Cayne:

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Q: Did you ever hear while you were at Bear Stearns that Mr. Cayne may have trader or insider information in connection with St. Joe Minerals Corporation?

Q: Did Mr. Cayne ever have any conversation with you about St. Joe Minerals?

Q: Did you happen to overhear any conversations between Mr. Cayne and anyone else regarding St. Joe Minerals?

And still later in the questioning comes this exchange:

Q: Have you had any type of business dealings with Mr. Cayne?

A: There's no relationship with Bear Stearns.

Q: Pardon?

A: Other than Bear Stearns, no.

Q: Have you been a participant in any type of business venture with Mr. Cayne?

Q: Do you have any expectation of participating in any business venture with Mr. Cayne?

Q: Have you had any business participations with Mr. Theram?

A: No; nor do I anticipate any.

Q: Mr. Epstein, did anyone at Bear Stearns tell you in words or substance that you should not divulge anything about St. Joe Minerals to the staff of the Securities and Exchange Commission?

Q: Has anyone indicated to you in any way, either directly or indirectly, in words or substance, that your compensation for this past year or any future monies coming to you from Bear Stearns will be contingent upon your not divulging information to the Securities and Exchange Commission?

A: No.

Despite the circumstances of Epstein's leaving, Bear Stearns agreed to pay him his annual bonus—which he anticipated as being approximately $100,000.

The S.E.C. never brought any charges against anyone at Bear Stearns for insider trading in St. Joe, but its questioning seems to indicate that it was skeptical of Epstein's answers. Some sources have wondered why, if he was such a big producer at Bear Stearns, he would have given it up over a mere $2,500 fine.

Certainly the years after Epstein left the firm were not obviously prosperous ones. His luck didn't seem to change until he met Hoffenberg.

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One of Epstein's first assignments for Hoffenberg was to mastermind doomed bids to take over Pan American World Airways in 1987 and Emery Air Freight Corp. in 1988. Hoffenberg claimed in a 1993 hearing before a grand jury in Illinois that Epstein came up with the idea of financing these bids through Towers's acquisition of two ailing Illinois insurance companies, Associated Life and United Fire. "He was hired by us to work on the securities side of the insurance companies and Towers Financial, supposedly to make a profit for us and for the companies," Hoffenberg reportedly told the grand jury. He also alleged that Epstein was the "technician," executing the schemes, although, having no broker's license, he had to rely on others to make the trades. Much of Hoffenberg's subsequent testimony in his criminal case has proven to be false, and Epstein has claimed he was merely asked how the bids could be accomplished and has said he had nothing to do with the financing of them. Yet Richard Allen, the former treasurer of United Fire, recalls seeing Epstein two or three times at the company. He and another executive say they had direct dealing with Epstein over the finances. And in his deposition of 1989, Epstein stated that he was the one who executed "all" Hoffenberg's instructions to buy and sell the stock. He called it "making the orders." He could not recall whether he had chosen the brokers used.

To win approval from the Illinois insurance regulators for Towers's acquisition of the companies, Hoffenberg promised to inject $3 million of new capital into them. In fact, in his grand-jury testimony Hoffenberg claimed that he, his chief operating officer, Mitchell Brater, and Epstein came up with a scheme to steal $3 million of the insurance companies' bonds to buy Pan Am and Emery stock. "Jeffrey Epstein and Mitch Brater arranged the various brokerage accounts for the bonds to be placed with in New York, and I think one in Chicago, Rodman & Renshaw," Hoffenberg reportedly said. Then, said Hoffenberg, while making it appear as though they were investing the bonds in much safer financial instruments, they used them as collateral to buy the stock. "Epstein was the person in charge of the transactions, and Mitchell Brater was assisting him with it in coordination on behalf of the insurance companies' money," Hoffenberg claimed at the time.

At one point, according to Hoffenberg, a broker forged the documents necessary for a $1.8 million check to be written on insurance-company funds. The check was used to buy more stock in the takeover targets. Meanwhile, in order to throw the insurance regulators off, the $1.8 million was reported as being safely invested in a money-market account.

United Fire's former chief financial officer Daniel Payton confirms part of Hoffenberg's account. He says he recalls making one or two telephone calls to Epstein (at Hoffenberg's direction) about the missing bonds. "He said, 'Oh, yeah, they still exist.' But we found out later that he had sold those assets … leveraged them … [and] used some margin account to take some positions in … Emery and Pan Am," says Payton.

Epstein's extraordinary creativity was, according to Hoffenberg, responsible for the purchase by the insurance companies of a $500,000 bond, with no money down. "Epstein created a great scheme to purchase a $500,000 treasury bond that would not be shown … [as] margined or collateralized," he reportedly told the grand jury. "It looked like it was free and clear but it actually wasn't," he said.

Epstein has denied he ever had any dealings with anyone from the insurance companies. But Richard Allen says he recalls talking to Epstein at Hoffenberg's direction and telling him it was urgent they retrieve the missing bonds for a state examination. According to Allen, Epstein said, "We'll get them back." He had "kind of a flippant attitude," says Allen. "They never came back."

Epstein, according to Hoffenberg, also came up with a scheme to manipulate the price of Emery Freight stock in an attempt to minimize the losses that occurred when Hoffenberg's bid went wrong and the share price began to fall. This was alleged to have involved multiple clients' accounts controlled by Epstein.

Eventually, in 1991, insurance regulators in Illinois sued Hoffenberg. He settled the case, and Epstein, who was only a paid consultant, was never deposed or accused of any wrongdoing. Barry Gross, the attorney who was handling the suit for the regulators, says of Epstein, "He was very elusive…. It was hard to really track him down. There were a substantial number of checks for significant dollars that were paid to him, I remember…. He was this character we never got a handle on. Again we presumed that he was involved with the Pan Am and Emery run that Hoffenberg made, but we never got a chance to depose him."

"From the government's discovery in the main sentencing against Hoffenberg it would seem the government was perhaps a bit lazy," says David Lewis, who represented Mitchell Brater. "They went for what they knew they could get … and that was the fraudulent promissory notes [i.e., the much larger and unrelated part of Hoffenberg's fraud, based in New York State]…. What they couldn't get, they didn't bother with."

Another lawyer involved in the criminal prosecution of Hoffenberg says, "In a criminal investigation like that, when there is a guilty plea, to be quick and dirty about it, discovery is always incomplete…. They don't have to line up witnesses; they don't have to learn every fact that might come out on cross-examination."

Epstein was involved with Hoffenberg in other questionable transactions. Financial records show that in 1988 Epstein invested $1.6 million in Riddell Sports Inc., a company that manufactures football helmets. Among his co-investors were the theater mogul Robert Nederlander and attorney Leonard Toboroff. A source close to this transaction claims that Epstein told Nederlander and Toboroff that he had raised his share of the money from a Swiss banker, whose identity they could not be allowed to know. But Hoffenberg has claimed the money came from him, and Towers's financial statements for that year show a loan to Epstein of $400,000. (Epstein has said he can't remember the details and has disputed the accuracy of the Towers financial reports.)

Around the same time, Nederlander and Toboroff let Epstein come in with them on a scheme to make money out of Pennwalt, a Pennsylvania chemical company. The plan was to group together with two other parties to take a substantial declared position in the stock. According to a source, Epstein was supposed to help Nederlander and Toboroff raise $15 million. He seemed to fail to find other investors, say those familiar with the deal. (Epstein has said he was merely an investor.) He invested $1 million, which he told his co-investors was his own money. But in his

1989 deposition he said that he put in only $300,000 of his own money. Where did the rest come from? Hoffenberg has said it came from him, in a loan that Nederlander and Toboroff didn't know about.

Two things happened that alarmed Nederlander and Toboroff. After the group signaled a possible takeover, the Pennwalt management threatened to sue the would-be raiders. Epstein was reluctant initially to give a deposition about his share of the money, telling Toboroff there were "reasons" he didn't want to. Then, after the opportunity for new investors was closed, co-investors recall Epstein announcing that he'd found one at last: Dick Snyder, then C.E.O. of the publisher Simon & Schuster, who wanted to put up approximately $500,000. (Neither Epstein nor Snyder can now recall the investment. Yet in the 1989 deposition Epstein said that he had recruited Snyder, whom he had met socially, into the deal.)

According to a source, Toboroff and Nederlander told Epstein that Snyder was too late, but, without their realizing it, Hoffenberg has claimed, Snyder wrote a check to Hoffenberg and bought out some of his investment. But then Snyder wanted out.

"Nederlander started to get these irate calls from [Snyder,] who wasn't part of the deal, saying he was owed all this money," says someone close to the deal. Toboroff and Nederlander were baffled.

Eventually, a source close to Hoffenberg says, Hoffenberg paid Snyder off.

Just as Nederlander and Toboroff were growing wary of Epstein, he became increasingly involved with Leslie Wexner, whom he had met through insurance executive Robert Meister and his late wife. Epstein has told people that he met Wexner in 1986 in Palm Beach, and that he won his confidence by persuading him not to invest in the stock market, just as the 1987 crash was approaching. His story has subsequently changed. When asked if Wexner knew about his connection to Hoffenberg, Epstein said that he began working for Wexner in 1989, and that "it was certainly not the same time."

Wherever and whenever it was that Epstein and Wexner actually met, there was an immediate and strong personal chemistry. Wexner says he thinks Epstein is "very smart with a combination of excellent judgment and unusually high standards. Also, he is always a most loyal friend."

Sources say Epstein proved that he could be useful to Wexner as well, with "fresh" ideas about investments. "Wexner had a couple of bad investments, and Jeffrey cleaned those up right away," says a former associate of Epstein's.

Before he signed on with Wexner, Epstein had several meetings with Harold Levin, then head of Wexner Investments, in which he enunciated ideas about currencies that Levin found incomprehensible. "In fact," says someone who used to work very closely with Wexner, "almost everyone at the Limited wondered who Epstein was; he literally came out of nowhere."

"Everyone was mystified as to what his appeal was," says Robert Morosky, a former vice-chairman of the Limited.

Much of Epstein's work is related to cleaning up, tightening budgets, and efficiencies. One person who worked for Wexner and who saw a contract drawn up between the two men says Epstein is involved in "everything, not just a little here, a little there. Everything!" In addition, he says, "Wexner likes having a hatchet man…. Whenever there is dirty work to be done he'd stick Jeffrey on it…. He has a reputation for being ruthless but he gets the job done."

Epstein has evidently been asked to fire personal-staff members when needed. "He was that mysterious person that everyone was scared to death of," says a former employee.

Meanwhile, he is also less than popular with some people outside Wexner's company with whom he now deals. "He 'inserted' himself into the construction process of Leslie Wexner's yacht…. That resulted in litigation down the road between Mr. Wexner and the shipyard that eventually built the vessel," says Lars Forsberg, a lawyer whose firm at the time, Dickerson and Reily, was hired to deal with litigation stemming from the construction of Wexner's *Limitless*—at 315 feet, one of the largest private yachts in the world. Evidently, Epstein stalled on paying Dickerson and Reily for its work. "It's probably once or twice in my legal career that I've had to sue a client for payment of services that he'd requested and we'd performed … without issue on the performance," says Forsberg. In the end the matter was settled, but Epstein claims he now has no recollection of it.

The incident is one of a number of disputes Epstein has become embroiled in. Some are for sums so tiny as to be baffling; for instance, Epstein sued investment adviser Herbert Glass, who sold him the Palm Beach house in 1990, for $13,444—Epstein claimed this was owed him for furnishings removed by Glass.

In 1998 the U.S. Attorney's Office sued Epstein for illegally subletting the former home of the deputy consul general of Iran to attorney Ivan Fisher and others. Epstein paid $15,000 a month in rent to the State Department, but he charged Fisher and his colleagues $20,000. Though the exact terms of the agreement are sealed, the court ruled against Epstein.

Wexner offers some insight into his friend's combative style. "Many times people confuse winning and losing," Wexner says. "Jeffrey has the unusual quality of knowing when he is winning. Whether in conversations or negotiations, he always stands back and lets the other person determine the style and manner of the conversation or negotiation. And then he responds in their style. Jeffrey sees it in chivalrous terms. He does not pick a fight, but if there is a fight, he will let you choose your weapon."

One case is rather more serious. Currently, Citibank is suing Epstein for defaulting on loans from its private-banking arm for $20 million. Epstein claims that Citibank "fraudulently induced" him into borrowing the money for investments. Citibank disputes this charge.

The legal papers for another case offer a rare window into Epstein's finances. In 1995, Epstein stopped paying rent to his landlord, the nonprofit Municipal Arts Society, for his office in the Villard House. He claimed that they were breaking the terms of the lease by not letting his staff in at night. The case was eventually settled. However, one of the papers filed in this dispute is Epstein's financial statement for 1988, in which he claimed to be worth $20 million. He listed

that he owned $7 million in securities, $1 million in cash, zero in residential property (although he told sources that he had already bought the home in Palm Beach), and $11 million in other assets, including his investment in Riddell. A co-investor in Riddell says: "The company had been bought with a huge amount of debt, and it wasn't public, so it was meaningless to attach a figure like that to it … the price it cost was about $1.2 million." The co-investors bought out Epstein's share in Riddell in 1995 for approximately $3 million. At that time, when Epstein was asked, as a routine matter, to sign a paper guaranteeing he had access to a few million dollars in case of any subsequent disputes over the sale price, Wexner signed for him. Epstein has explained that this was because the co-investors wanted an indemnity against being sued by Wexner. One of the investors calls this "bullshit."

Epstein's appointment to the board of New York's Rockefeller University in 2000 brought him into greater social prominence. Boasting such social names as Nancy Kissinger, Brooke Astor, and Robert Bass, the board also includes such pre-eminent scientists as Nobel laureate Joseph Goldstein. "Epstein was thrilled to be elected," says someone who knows him.

After one term Epstein resigned. According to *New York* magazine, this was because he didn't like to wear a suit to meetings. A spokesperson for the Rockefeller board says Epstein left because he had insufficient time to commit; a board member recalls that he was "arrogant" and "not a good fit." The spokesperson admits that it is "infrequent" for board members not to be renominated after only one term.

Still, the recent spate of publicity Epstein has inspired does not seem to have fazed him. In November he was spotted in the front row of the Victoria's Secret fashion show at New York's Lexington Avenue Armory; around the same time the usual coterie of friends and beautiful women were whisked off to Little St. James (which he tells people has been renamed Little St. Jeff) for a long weekend.

Thanks to Epstein's introductions, says Martin Nowak, the biologist finds himself moving from Princeton to Harvard, where he is assuming the joint position of professor of mathematics and professor of biology. Epstein has pledged at least $25 million to Harvard to create the Epstein Program for Mathematical Biology and Evolutionary Dynamics, and Epstein will have an office at the university. The program will be dedicated to searching for nature's algorithms, a pursuit that is a specialty of Nowak's. For Epstein this must be the summit of everything he has worked toward: he has been seen proudly displaying Harvard president Larry Summers's letter of commitment as if he can't quite believe it is real. He says he was reluctant to have his name attached to the program, but Summers persuaded him. He rang his mentor Wexner about it, and Wexner told him it was all right.

An insatiable, restless soul, always on the move, Epstein builds a tremendous amount of downtime into his hectic work schedule. Yet there is something almost programmed about his relaxation: it's as if even pleasure has to be measured in terms of self-improvement. Nowak says that, when he goes to stay with Epstein in the Caribbean, they'll get up at six and, as the sun rises, have three-hour conversations about theoretical physics. "Then he'll go off and do some work, re-appear, and we'll talk some more."

http://www.vanityfair.com/news/2003/03/jeffrey-epstein-200303

Another person who went to the island with Epstein, Maxwell, and several beautiful women remembers that the women "sat around one night teasing him about the kinds of grasping women who might want to date him. He was amused by the idea…. He's like a king in his own world."

Many people comment there is something innocent, almost childlike about Jeffrey Epstein. They see this as refreshing, given the sophistication of his surroundings. Alan Dershowitz says that, as he was getting to know Epstein, his wife asked him if he would still be close to him if Epstein suddenly filed for bankruptcy. Dershowitz says he replied, "Absolutely. I would be as interested in him as a friend if we had hamburgers on the boardwalk in Coney Island and talked about his ideas."

EXHIBIT 6

https://twitter.com/AlanDersh

EXHIBIT 5

Letters

Letter to the Editor: Article Misrepresented Dershowitz

By Alan M. Dershowitz
Alan M. Dershowitz is a Professor of Law emeritus at Harvard Law School.

December 5, 2018

To the editor,

The Crimson story regarding Jeffrey Epstein omitted the central point I made in my interview with the reporter. I welcome an investigation by Harvard or any other institution, including prosecutors, into the wilfully false charges made by Virginia Roberts for financial gain. Omitting this crucial statement is irresponsible and unethical journalism.

Virginia Roberts leveled her false accusations four years ago. At the time, I disproved them categorically. The matter was put to rest, with even her lawyers admitting that it was a mistake and wrong. Then four years later the Miami Herald recycled this false accusation and The Crimson reported on the Herald's recycled report. I wrote a letter to the editor of the Herald pointing to the incontrovertible evidence that Roberts made up the accusation out of whole cloth in order to obtain millions of dollars from Leslie Wexner.

I was able to disprove Roberts' false accusation by producing all of my travel, AmEx, and TV appearance records which showed where I was, and, more importantly, where I wasn't during the entire period Virginia Roberts was in contact with Jeffrey Epstein. These records prove incontrovertibly that I could not have been, and was not, where Roberts' falsely claimed to have met me — a Caribbean Island, a New Mexico Ranch, a private jet, a Palm Beach mansion — during the relevant time period.

I also called for an independent investigation by the former Director of the F.B.I., a highly respected former federal judge and assistant U.S. attorney. He reviewed all of the records and other evidence and concluded that "the totality of the evidence ... refutes the allegations."

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In addition, the judge before whom the accusation was made struck the accusation from the record and sanctioned her lawyers for filing it. One of her own lawyers then acknowledged that his client was “wrong” “simply wrong,” and her other lawyers formally withdrew the accusation, admitting it was a “mistake.”

Not only did Virginia Roberts lie about me, she lied about Al and Tipper Gore and President Bill Clinton claiming that she met the three of them on Jeffrey Epstein’s island — a claim refuted by secret service records that established that none of the three were on that island during that period of time.

There is evidence that directly proves I was framed. These include emails between Roberts and a journalist, a book manuscript by Roberts and a legal brief that are smoking guns showing that I was “deliberately framed for financial reasons.” These exculpatory documents have been sealed by Roberts’ lawyers and I am seeking to make them public.

Roberts' closest friend told me that Roberts told her she “felt pressure to go after [Dershowitz]” in order to obtain money from Leslie Wexner and that Roberts had never previously included me among the people with whom she claimed to have had sex. I have a tape recording of this conversation.

Not surprisingly, Roberts made her false claims against me only in court documents that immunize her from being sued for defamation. When she was interviewed by the Miami Herald, she refused to repeat her false allegations outside of court. The Crimson did not ask her directly to repeat her false allegations to them. As a matter of journalistic ethics, The Crimson should not have published an accusation without interviewing the accuser on the record. I now challenge Roberts to repeat her false accusations to The Crimson or other media, so that I can sue her for defamation and let a jury decide — after seeing all the evidence including the emails and book manuscript — who is telling the truth and who is lying.

I want an investigation or trial to finally prove that Roberts made up the entire story, so that it can finally be put to rest.

Alan M. Dershowitz is a Professor of Law emeritus at Harvard Law School.

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EXHIBIT 4

Dershowitz Goes Off on Woman Who Made Underage Sex Allegations: 'She Should Be Seriously Punished'

by Ronn Blitzer | 2:26 pm, December 4th, 2018

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Just hours after convicted pedophile **Jeffrey Epstein** agreed to settle a civil case brought against him by attorney **Bradley Edwards**, Epstein's lawyer from his past criminal case, **Alan Dershowitz**, discussed his former client on the Law&Crime Network. Epstein was accused of trafficking more than 40 underage girls for sex, and one such girl claimed Dershowitz himself had sex with her when she was underage.

Dershowitz vehemently denies the claim, telling host **Brian Ross** that accuser **Virginia Roberts** is a "certified, complete, total liar," and that her allegations are a "complete and total fabrication." He also added that she should be punished by the law for what she did.

The Harvard Law Professor Emeritus noted that Roberts' allegations were eventually withdrawn, and that the FBI recognized the evidence showed he was not where she said he was. He pointed to documented evidence that proves he is innocent.

"I can prove conclusively that she made the whole thing up," Dershowitz said, citing travel records that he says prove where he was at the time she claims she had sex with him. "It's conclusive, conclusive evidence."

"More importantly, I can prove where I wasn't," he said, after stating outright, "Never met her, don't know who she is, never heard of her."

Similarly, Dershowitz said that Roberts claimed that notable figures such as **Bill Clinton**, **Al Gore**, and **Tipper Gore** were present on an

island, when Secret Service records proved they were never even there.

Dershowitz said Roberts' allegations were part of an extortion plot, and that she "should be seriously punished for submitting false information and a false affidavit."

The attorney emphasized that Roberts has not been willing to repeat her allegations against him in public, and that she has only accused him in the context of litigation, which affords certain protections.

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"She simply hides behind litigation privileges," Dershowitz said, encouraging Ross to call Roberts and see if she would repeat her claims. "And if she does, I will be in court the next day suing her for defamation and I will win the case 'cause I can prove conclusively that she made up the whole story from top to bottom."

Ross then turned to the controversial deal that Epstein received from federal prosecutors who were investigating the trafficking case against him. Federal prosecutors agreed not to prosecute him, and let him plead guilty to state charges that resulted in a 13-month prison sentence that allowed Epstein to leave prison during the day for work. Federal prosecutors allegedly did not even inform victims before making the deal, which is now the subject of a request for an Inspector General investigation. Congressional Democrats said in a letter that they want to know more about the circumstances surrounding the deal, which was made by then-U.S. Attorney and current Secretary of Labor **Alex Acosta**.

As Epstein's defense attorney in that case, Dershowitz is not upset about it the deal at all.

"I'm very proud of that deal, that's what lawyers are supposed to do," he said. "Lawyers are supposed to get the best deals they can." If he could have gotten 10 months or no time at all, that would have been even better, he said.

Acosta said in the past that Epstein's lawyers, including Dershowitz, put pressure on his office by investigating his staff. Dershowitz has denied this.

"Acosta was very tough," Dershowitz said, contrary to concerns that he did anything improper. Dershowitz pointed out that the problem feds had was proving that girls were transported in interstate commerce.

"Unless you can prove that, you don't have a federal case, only a state case."

[Image via Law & Crime Network screengrab]

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Alan Dershowitz, Jefrey Epstein

EXHIBIT 2

Letter to the Editor: Alan Dershowitz responds to Raw Story report

RAW STORY - COMMENTARY
01 DEC 2018 AT 18:36 ET

Alan Dershowitz (Fox News)

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To the Editor,

In your recent story titled "**Trump Defender Alan Dershowitz is deeply involved in the sordid Jeffrey Epstein scandal**" you level outright false claims that I had sexual encounters with Virginia Roberts. These are exactly the same false claims that were made in 2014 and were thoroughly disproved and withdrawn.

https://www.rawstory.com/2018/12/letter-editor-alan-dershowitz-responds-raw-story-report/

After leveling these claims in detail, you say that I "steadfastly denied her claims." Not only did I deny the claims, I conclusively disproved them. I produced my travel, phone, credit card, and TV appearance records conclusively proving I could not have been and was not in any of the places Roberts claims I was during the time that she knew Epstein. The former Director of the F.B.I., assisted by a former assistant U.S. attorney and a chief federal marshal, reviewed these records and the other evidence and concluded that "the totality of the evidence found during the investigation refutes the allegations." The judge struck Robert's affidavit and sanctioned her lawyers for filing it, and her lawyers then withdrew their accusation admitting that it was a mistake. After reviewing the evidence, ABC News cancelled their plan to show an interview with Roberts because she was not credible.

There is other evidence, currently under seal, that directly establishes my innocence. I am seeking to unseal emails between Roberts and a journalist, a book manuscript by Roberts and a legal brief that are smoking guns showing that I was "deliberately framed for financial reasons."

There is also irrefutable evidence that Roberts lied about other people for money. She told a British tabloid that she met Al and Tipper Gore on Epstein's Island and she swore that she had dinner with Bill Clinton on the Island. But Secret Service records prove that none of these people were on the Island. Indeed, the Gores didn't even know Epstein.

I have a tape recording of a conversation with Robert's closest friend in which she says that Roberts told her she "felt pressure to go after [Dershowitz]" in order to obtain money from a wealthy businessman, and that Roberts had never previously included me among the people with whom she claimed to have had sex.

https://www.rawstory.com/2018/12/letter-editor-alan-dershowitz-responds-raw-story-report/

One of Roberts own lawyers has acknowledged in front of witnesses that Roberts' claims against me are "wrong" "simply wrong." The evidence of my innocence is indisputable: I never met Roberts; I never had sex with her; she simply made up the entire story for money.

Roberts made her false claims against me in court documents that immunize her from being sued for defamation. I challenge her to repeat her false accusations out of court, so that I can sue her for defamation and let a jury decide—after seeing all the evidence including the emails and book manuscript—who is telling the truth and who is lying.

*Editors Note: Professor Alan Dershowitz sent the previous response to our story, "**Trump Defender Alan Dershowitz is deeply involved in the sordid Jeffrey Epstein scandal.**" In his response, Mr. Dershowitz claims Raw Story accused him of having sexual encounters with Virginia Roberts. Upon careful review of **our story**, both before and after publication, this is not the case. Our story reports the accusations leveled by others.*

https://www.rawstory.com/2018/12/letter-editor-alan-dershowitz-responds-raw-story-report/

EXHIBIT 1

Even from jail, sex abuser manipulated the system. His victims were kept in the dark

BY Julie K. Brown
NOV. 28, 2018

PERVERSION of JUSTICE

A decade before #MeToo, a multimillionaire sex offender from Florida got the ultimate break.

Palm Beach County Courthouse

June 30, 2008

Jeffrey Edward Epstein appeared at his sentencing dressed comfortably in a blue blazer, blue shirt, jeans and gray sneakers. His attorney, Jack Goldberger, was at his side.

At the end of the 68-minute hearing, the 55-year-old silver-haired financier — accused of sexually abusing dozens of underage girls — was fingerprinted and handcuffed, just like any other criminal sentenced in Florida.

But inmate No. W35755 would not be treated like other convicted sex offenders in the state of Florida, which has some of the strictest sex offender laws in the nation.

Ten years before the #MeToo movement raised awareness about the kid-glove handling of powerful men accused of sexual abuse, Epstein's lenient sentence and his extraordinary treatment while in custody are still the source of consternation for the victims he was accused of molesting when they were minors.

Beginning as far back as 2001, Epstein lured a steady stream of underage girls to his Palm Beach mansion to engage in nude massages, masturbation, oral sex and intercourse, court and police records show. The girls — mostly from disadvantaged, troubled families — were recruited from middle and high schools around Palm Beach County. Epstein would pay the girls for massages and offer them further money to bring him new girls every time he was at his home in Palm Beach, according to police reports.

The girls, now in their late 20s and early 30s, allege in a series of federal civil lawsuits filed over the past decade that Epstein sexually abused hundreds of girls, not only in Palm Beach, but at his homes in Manhattan, New Mexico and in the Caribbean.

In 2007, the FBI had prepared a 53-page federal indictment charging Epstein with sex crimes that could have put him in federal prison for life. But then-Miami U.S. Attorney Alexander Acosta signed off on a non-prosecution agreement, which was negotiated, signed and sealed so that no one would know the full scope of Epstein's crimes. The indictment was shelved, never to be seen again.

Epstein instead pleaded guilty to lesser charges in state court, and was required to register as a sex offender. He was sentenced to 18 months incarceration.

But Epstein — who had a long list of powerful, politically connected friends — didn't go to state prison like most sex offenders in Florida. Instead, the multimillionaire was assigned to a private wing of the Palm Beach County stockade, where he was able to hire his own security detail. Even then, he didn't spend much time in a cell. He was allowed to go to his downtown West Palm Beach office for work release, up to 12 hours a day, six days a week, records show.

Read Next

LOCAL

Sex abuser Jeffrey Epstein was surrounded by powerful people. Here's a sampling

He was permitted to hire his own private psychologist for his required sex-offender counseling, and after his release from jail, his subsequent year of probation under house arrest was filled with trips on his corporate jet to Manhattan and to his home in the U.S. Virgin Islands — all approved by the courts with no objections from the state.

On the morning of his sentencing in 2008, none of Epstein's victims were in the courtroom to protest his soft jail term or the unusual provisions of his incarceration and probation — and that was by design.

Palm Beach multimillionaire Jeffrey Epstein is a free man, despite sexually abusing dozens of underage girls according to police and prosecutors. His victims have never had a voice, until now.

By

Emails and letters contained in court filings reveal the cozy, behind-the-scenes dealings between federal prosecutors and Epstein's indomitable legal team during the run-up to his federal plea deal, as they discussed ways to minimize his criminal charges and avoid informing the girls about the details of the deal until after the case was resolved.

That arrangement benefited Epstein in a number of ways. Unlike other high-profile sex crime cases, federal prosecutors agreed to keep his sentencing quiet, thereby limiting media coverage. His underage victims — identified in FBI documents — weren't told about the plea deal so they weren't in court, where they could voice their objections and possibly sway the judge to give Epstein a harsher sentence or reject the agreement altogether.

Most important, Epstein's crimes would be reduced to felony prostitution charges, giving him the ability to argue that the girls weren't victims at all — they were prostitutes.

Four accomplices named in Epstein's non-prosecution agreement — Nadia Marcinkova, Sarah Kellen, Adriana Ross and Lesley Groff — were also given immunity from federal prosecution. Marcinkova was a young girl when Epstein brought her from Yugoslavia to live with him. Several victims told police that she was involved in orgies with Epstein and underage girls. Ross, Groff and Kellen, now known by her married name, Vickers, were schedulers who arranged his underage sex sessions, according to the FBI and police.

Marcinkova and Kellen, through their attorneys, declined to comment for this story. The Herald was unsuccessful in reaching Ross and Groff.

Acosta, who is now President Donald Trump's secretary of labor, told lawmakers last year at his confirmation hearing that he did not know that Epstein would receive such liberal treatment while incarcerated. But court records show that federal prosecutors under his authority acquiesced to many of Epstein's demands, including that he not go to federal or state prison.

"I can't remember how I found out that he had taken a plea,'' said Courtney Wild, identified by the FBI as one of more than three dozen underage girls — some of them as young as 13 — who had been molested by Epstein at his waterfront estate between 2001 and 2005.

"We were purposefully misled into believing that his sentencing [in state court] had nothing to do with the federal crimes he committed against me or the other girls.''

Epstein, now 65, was released in 2009 after serving 13 months.

Wild, who was 14 when she met Epstein, is suing the federal government, alleging that prosecutors kept her and other victims in the dark as part of a conspiracy to give Epstein — described in the lawsuit as "a powerful, politically connected multimillionaire" — one of the most lenient deals for a serial child sex offender in history.

Courtney Wild is suing the federal government, claiming that prosecutors deliberately kept her and other victims of Jeffrey Epstein in the dark about the status of his case. The U.S. Attorney's Office signed a non-prosecution agreement with the multimillionaire. Emily Michot *EMICHOT@MIAMIHERALD.COM*

Now 31, Wild is Jane Doe No. 1 in "Jane Doe 1 and Jane Doe 2 vs. the United States," which seeks to overturn Epstein's plea agreement on the grounds that it was executed in violation of the federal Crime Victims' Rights Act. The measure affords crime victims a series of rights, including to confer with prosecutors and to be notified about plea negotiations and sentencing.

That lawsuit — and an unrelated state court case scheduled for trial on Dec. 4 — could expose more about Epstein's crimes, as well as who else was involved and whether there was any undue influence that tainted the federal case.

Support investigative journalism

The Miami Herald obtained thousands of FBI and court records, lawsuits, and witness depositions, and went to federal court in New York to access sealed documents in the reporting of "Perversion of Justice." The Herald also tracked down more than 60 women who said they were victims, some of whom had never spoken of the abuse before.

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Some of Epstein's victims will finally have an opportunity to testify for the first time as part of the Dec. 4 case in state court in Palm Beach County. It pits Fort Lauderdale attorney Bradley Edwards against Epstein, who had accused Edwards of malfeasance in his representation of several victims.

Jack Scarola, the attorney representing Edwards, said Epstein should be held accountable for his unrelenting attacks against Edwards — as well as others who were involved in his case.

"We are going to demonstrate through this case that no one — no matter how much money they have — can abuse children and then attempt to bully those who come to the defense of children,'' said Scarola, a former state prosecutor.

Florida and beyond

Few people had as much insight into Epstein's lifestyle — and its international reach — as Virginia Roberts. By age 16, Roberts had lived a life that was beyond that of most high school girls.

At 11, she says, she was sexually molested by a family friend. At 12, she was smoking pot and skipping school. At 13, she was in and out of foster homes, and at 14, she was on the street.

In Miami, the runaway became a captive of a 65-year-old sex trafficker, Ron Eppinger. For months, she says, she was sexually abused, kept in an apartment and pimped out to pedophiles. After his indictment in 2000 on trafficking charges, Roberts returned to West Palm Beach and tried to heal.

Virginia Roberts, now Giuffre, says she was 16 and working as a locker room attendant at Donald Trump's Mar-a-Lago resort when she was approached by Ghislaine Maxwell, Jeffrey Epstein's associate, about becoming a masseuse for Epstein. *COURTESY OF VIRGINIA ROBERTS*

That summer, when Roberts was 16, she said her father helped her get a job as a locker room attendant at the spa at Donald Trump's Mar-a-Lago resort in Palm Beach, records show. Her father worked at the resort as a maintenance man.

There she said she met Ghislaine Maxwell, an Epstein friend and socialite daughter of the late British publishing magnate Robert Maxwell. She offered Roberts an opportunity to become a massage therapist, working for Epstein.

In a sworn court affidavit and in a recent interview with the Herald, Roberts described how Epstein and Maxwell began grooming her — not just to perform massages, but to sexually pleasure them and others.

"It started with one and it trickled into two and so on," Roberts told the Herald. "And before you know it, I'm being lent out to politicians and academics and royalty."

Roberts, too, was ordered to find Epstein girls — the younger, the better — by trolling areas where teenagers congregated, such as shopping malls, to lure girls to whatever residence Epstein was staying in at the time, she told the Herald.

She began to travel with Epstein and Maxwell to Epstein's other homes, in New York, New Mexico and the U.S. Virgin Islands — and her trips are documented in flight logs that frequently list her name or her initials as a passenger, court records show.

"His appetite was insatiable. He wanted new girls, fresh, young faces every single day — that was just the sickness that he had," Roberts said.

Neither Epstein nor his lead attorney, Goldberger, responded to requests for comment.

Roberts alleges that Epstein had cameras throughout his homes and said he liked her to tell him about the sexual peccadilloes of various important men she had sex with.

"Epstein and Maxwell also got girls for Epstein's friends and acquaintances. Epstein specifically told me that the reason for him doing this was so that they would 'owe him,' they would 'be in his pocket,' and he would 'have something on them,' " Roberts said in a court affidavit. "I understood him to

mean that when someone was in his pocket, they owed him favors.''

Roberts elaborated in her interview with the Herald, saying that Epstein had access to girls through a modeling agency that recruited them from overseas.

Epstein, who was close to Les Wexner, the owner of Victoria's Secret, often talked about his connections to people in the modeling, fashion and acting industries, Roberts told the Herald.

"He [Epstein] would tell the girls, 'Hey, I will give you a modeling contract if you go have sex with this man [whichever acquaintance Epstein designated],' '' she said.

Roberts' story about the modeling agency is supported, to a degree, by the sworn statement of a Miami woman named Maritza Vasquez, who was later interviewed in New York by an FBI agent from Miami. Vasquez worked as a bookkeeper for Mc2, owned by Epstein associate Jean-Luc Brunel. He employed scouts in South America, Europe and the former Soviet Union to find him models to bring to the United States, Vasquez said in a 2010 sworn court deposition obtained by the Herald.

Vasquez stated in the deposition that from 2003 to 2006 she handled all the finances and payroll for the agency, including a bank transaction involving Epstein. She said Epstein invested $1 million in Mc2.

The models were often very young — 13, 14 and 15 — and some of them were housed in apartments at 301 E. 66th St. in New York, a building purportedly owned by Epstein, the deposition said.

Epstein didn't charge the girls rent, Vasquez said, but Brunel charged them $1,000 a month, with four of them at a time sharing one apartment. The girls who were the youngest and most beautiful stayed at the 66th Street apartments, which were more luxurious than the other apartments that were used to house models who were not as young and desirable, she said.

Vasquez once let one of the models, who was 14, stay overnight with her after the girl ran into trouble with police for trying to get into a Manhattan nightclub. Vasquez also testified that she helped a lawyer obtain visas for the foreign models, and assisted with their transportation to and from modeling assignments and parties.

Vasquez said that even though the agency employed 200 to 300 models, the company didn't make any money and Brunel was always broke. Brunel would later sue Epstein, alleging that the financier's sex scandal had caused his business to fail, but the suit was eventually dropped.

Vasquez testified it wasn't unusual for the agency to send girls to an assignment with a wealthy client for $100,000 or more, but the girl wouldn't be paid the full amount — or anything at all — if she refused to be "molested.''

Vasquez considered herself a mother figure and often coached the youngest girls to stick to the 9-to-5 modeling assignments because she didn't think it was appropriate for them to be having sex.

She said she met Epstein only once, but she often helped arrange for girls — many of them underage — to be sent to his homes in New York, Palm Beach and his island in the Caribbean for parties. She heard salacious rumors about Epstein's parties, but testified she had no firsthand knowledge about whether they involved sex.

Vasquez said that she was questioned by the FBI and she tried to tell agents where to look for evidence.

Vasquez was eventually let go from the agency after she was accused of stealing money — money she claims was given to her by Brunel. Vasquez said she was placed on probation for the theft. She never heard from the FBI about Epstein again.

The Herald was unsuccessful in reaching Brunel through his former attorney.

In a written statement released in 2015, Brunel denied any involvement in trafficking underage models.

"I strongly deny having participated, neither directly nor indirectly, in the actions Mr. Jeffrey Epstein is being accused of," he said. "I strongly deny having committed any illicit act or any wrongdoing in the course of my work as a scouter or model agencies manager."

Too old at 19

In 2003, when Roberts turned 19, it was clear that Epstein had lost interest because she was too old for him, she said. She convinced him to pay for her to get training to become a real professional masseuse so that she could move on.

In an interview, she explained that Epstein arranged for her to take a class in Thailand, but it came with a hitch: She said she was instructed to pick up a Thai girl he had arranged to come to the States.

Roberts, who showed the Herald the written instructions for the rendezvous, never picked up the girl because Roberts met a man on the trip who would become her husband. The couple married and moved to Australia, where they currently live.

In 2007 — at the same time the FBI was investigating Epstein — Roberts, pregnant with her second child, said she unexpectedly received phone calls from Maxwell and Epstein. She said they were worried that she had told police about them. She assured them she had not spoken to anyone, she said.

Shortly afterward, Roberts said, she was contacted by someone who claimed to be with the FBI. But she was afraid to tell that person details, fearing it was really an Epstein associate posing as an FBI agent.

That agent, identified in court papers as Timothy Slater, confirmed that he and the other agent on the case, Nesbitt Kuyrkendall, called Roberts in January or February 2007. In a sworn statement, Slater said he informed Roberts that they suspected she was a victim of Epstein's.

The agent said Roberts answered basic questions, but became uncomfortable and "asked that I not bother her again."

Roberts said the agent didn't try too hard to convince her to talk, and she was surprised when he hung up after asking her a few graphic questions about her sex life. She said she was suspicious, but would have cooperated had the FBI talked to her in person and explained why they were asking about Epstein.

"I was still scared to death," Roberts said. "Jeffrey used to tell me that he owned the entire Palm Beach Police Department. I just didn't want my family harmed."

She nevertheless was listed by federal prosecutors as one of Epstein's Palm Beach victims.

As the years went by and Roberts had a daughter, she would be haunted by a fear that Epstein was still taking advantage of young girls. In 2011, she went public in a paid interview with a British tabloid, the Daily Mail, asserting that she had had sex with Prince Andrew, one of Epstein's friends, several times when she was a teen.

In her 2015 affidavit, she discussed in detail some of her alleged sex encounters with the prince and Epstein's other friends, including lawyer Alan Dershowitz. Edwards included the affidavit in the court file as part of the Jane Does' Crime Victims' Rights Act case, at which time it became public.

Virginia Roberts says she was loaned out by Jeffrey Epstein to his friend Prince Andrew, shown here. He denies they had sex. *COURTESY OF VIRGINIA ROBERTS*

In the affidavit, Roberts claimed that Epstein and Maxwell directed her to have sex with Andrew and Dershowitz and others. She had sex with Andrew three times, she alleged — once in London, when she was 17, again in New York, when she was 17, and a third time, as part of an orgy on Epstein's island, when she was 18. By law, at 17, she would have been above the age of consent in New York and England, but not in Florida, where the age of consent is 18.

As part of the affidavit, Roberts furnished a photograph of her with the prince and Maxwell, which she said was taken in London.

Dershowitz, who was part of Epstein's criminal defense team, was often a guest at Epstein's homes, she said.

"I had sexual intercourse with Dershowitz at least six times,'' Roberts wrote in the 2015 court affidavit. "The first time was when I was about 16, early on in my servitude to Epstein and it continued until I was 19.'' She detailed some of those alleged trysts, which she said happened at Epstein's homes in Palm Beach, New Mexico and on Epstein's island.

One of Epstein's housemen, Juan Alessi, testified in a 2009 sworn deposition that Dershowitz visited Epstein's Palm Beach home four or five times a year. He said that Roberts was a frequent visitor as well, but he never placed Dershowitz and Roberts at the house at the same time.

Alessi, who testified he worked for Epstein from 1999 to 2002, said there were often young girls who gave massages at the house, even in the middle of the night. But he said he never checked their ages, and only knew one girl for certain who was underage, because he had picked her up from high school. That girl, who is now an actress, was not one of Epstein's masseuses, Alessi said.

He also said he was Maxwell's driver, and he recalls waiting outside of Mar-a-Lago the day Maxwell met Roberts. He testified he saw Maxwell talking to Roberts and recalls Roberts coming to Epstein's mansion later that day. One of Alessi's jobs was to drive Maxwell to various spas in Palm Beach where she left business cards in order to "recruit'' more masseuses, he said in the sworn deposition.

Dershowitz, Prince Andrew and Maxwell have long denied Roberts' allegations.

In an interview with the Herald, Dershowitz reiterated that he had never met Roberts, and never saw Epstein with any underage girls.

"The story was 100 percent flatly categorically made-up,'' he said, adding that Roberts and her attorneys fabricated the assertion in order to get money from other powerful, wealthy people she alleges she had sex with.

"The only possible reason to accuse me in public and [them] in private is so she could get money,'' Dershowitz said.

Edwards and his co-counsel in the Crime Victims' lawsuit, University of Utah law professor Paul Cassell, sued Dershowitz for defamation and Dershowitz countersued in 2015. The case was settled out of court, with Dershowitz saying he had been vindicated.

Dershowitz said he received a massage at Epstein's Palm Beach home only once — but that it was just a regular, therapeutic massage by a masseuse — not by Roberts or anyone underage. Dershowitz's wife was there at Epstein's house at the time, Dershowitz said in the deposition taken for the case in 2015.

"I never had any knowledge of Jeffrey Epstein having any contact with any underage women — ever,'' Dershowitz told the Herald.

Edwards and Cassell admitted making a "tactical mistake" in filing the accusations against Dershowitz as part of a lawsuit not involving him. But they emphasized that the settlement had no bearing on the veracity of Roberts' allegations.

The judge for the Crime Victims' Rights Act lawsuit agreed that the affidavit was misplaced in that case, and it was dropped.

Prince Andrew's spokesman at Buckingham Palace did not respond to an email requesting comment.

Roberts, now 35, said it has taken her a long time to stand up to Epstein. She and 20 other victims received settlements from Epstein, ranging from $50,000 to more than $1 million. The exact amounts have been kept confidential.

"It takes so long until you are able to speak about it. It took me having a daughter and looking at this young, beautiful innocent baby to say I want to speak out about it now. I'm hoping that this will bring out more girls so that they say, Me Too.''

The state court hearing

The judge at Epstein's sentencing hearing at the Palm Beach County Courthouse knew very little about Epstein's crimes. The sentencing paperwork was restricted to Epstein's specific charges: one count of solicitation of prostitution and one count of procuring a person under the age of 18 for prostitution.

“Are there more than one victim?’’ Circuit Court Judge Deborah Dale Pucillo asked the prosecutor at Epstein’s sentencing on June 30, 2008.

“There’s several,’’ replied assistant state prosecutor Lanna Belohlavek.

“Are all the victims in both of these cases in agreement with the terms of this plea?‘‘ Pucillo later asked.

“Yes,‘‘ Belohlavek replied, telling the judge that she had spoken to “several” of Epstein’s victims.

Emails show that federal prosecutors didn’t want the judge to know how many victims and accomplices there were.

Federal prosecutor A. Marie Villafaña — in a September 2007 email to Epstein lawyer Jay Lefkowitz — said: “I will mention co-conspirators but I would prefer not to highlight for the judge all the other crimes and all the other persons that we could charge.’’

Attorney Spencer Kuvin happened to be in court that day because he’d heard Epstein was to appear, but Kuvin didn’t know why. He figured he’d use it as an opportunity to serve Epstein with civil court papers involving one of several victims he represented. Instead, he listened to what was happening and couldn’t believe that no one had contacted him or his clients.

“I was shocked to learn that the proceeding involved my client’s case and there was nothing I could do except watch as they disposed of her case without ever telling her,’’ Kuvin said.

At the hearing, Belohlavek and Epstein’s attorney, Goldberger, were in sync, the court transcript shows. Epstein would be required to register as a sex offender, but his probation would not be served under the strict requirements of sex offender probation.

Jeffrey Epstein is a registered sex offender in New York State and Florida. Emily Michot *EMICHOT@MIAMIHERALD.COM*

The judge didn’t question those provisions, but she did ask why Epstein was going to serve his sentence in the Palm Beach County stockade instead of in a Florida state prison, like most sex offenders.

After he pleaded guilty in state court, Jeffrey Epstein was assigned to a private section of the Palm Beach County stockade. Soon, however, he was allowed to leave the compound six days a week, 12 hours a day, for what was termed work release. Emily Michot *EMICHOT@MIAMIHERALD.COM*

"We just decided that was the best way to accomplish what needed to be done here and the parties agreed that that sentence satisfied everyone's requirements,'' Goldberger replied.

Said Judge Pucillo: "The taxpayers of Palm Beach County are going to pay 18 months to house this guy instead of DOC [the Department of Corrections]?"

Belohlavek: "Right.''

Pucillo did not respond to a request for comment on the case.

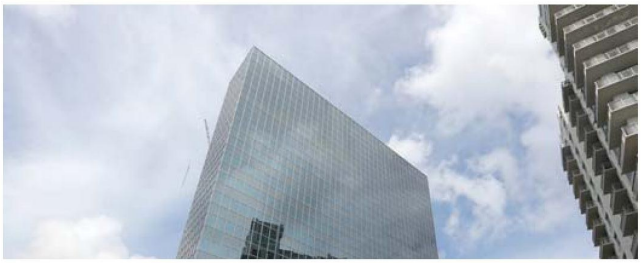
Villafaña, the lead federal prosecutor in Epstein's case, was in the courtroom, but there's no indication she objected to Epstein's cozier jail accommodations.

When he entered jail in July 2008, Epstein was arguably the most well-known inmate there. Records also show that Epstein hired Palm Beach sheriff's deputies for his security details, paying them for the hours they spent monitoring him on work release at his West Palm Beach office, where he often stayed until 10 p.m., jail logs show.

The Herald reviewed their time sheets, showing that the deputies logged visitors coming and going to and from his office throughout the day. A record log of his visitors was kept in a safe, but the log no longer exists, according to a spokeswoman for the Palm Beach County Sheriff's Office.

One deputy who often worked Epstein's detail said that his assignment was to stay in a front reception room of Epstein's office. Epstein was in a separate office — with the door closed — most of the day as he accepted visitors, both male and female, the deputies' logs show.

"It was not our job to monitor what he was doing in that office,'' the deputy, now retired, told the Herald.



In their early reports in July 2008, the deputies referred to Epstein as "inmate'' but within a few weeks the language had changed and he was called a "client." He was occasionally allowed to take a break for lunch by sitting outside in a park, the records show, and they also gave him permission to scout for a new office. While on work release, he was required to wear an ankle bracelet to monitor his whereabouts.

The work release was approved by the Palm Beach County Sheriff's Office, said spokeswoman Therese Barbera.

"Jeffrey Epstein, while in custody, met the criteria for the Work Release Program,'' Barbera wrote in an email. "There was no factual basis to deny Mr. Epstein the same availability of this program that is offered to other inmates under similar circumstances. Mr. Epstein was closely monitored and there were no problems encountered during his time in the program."

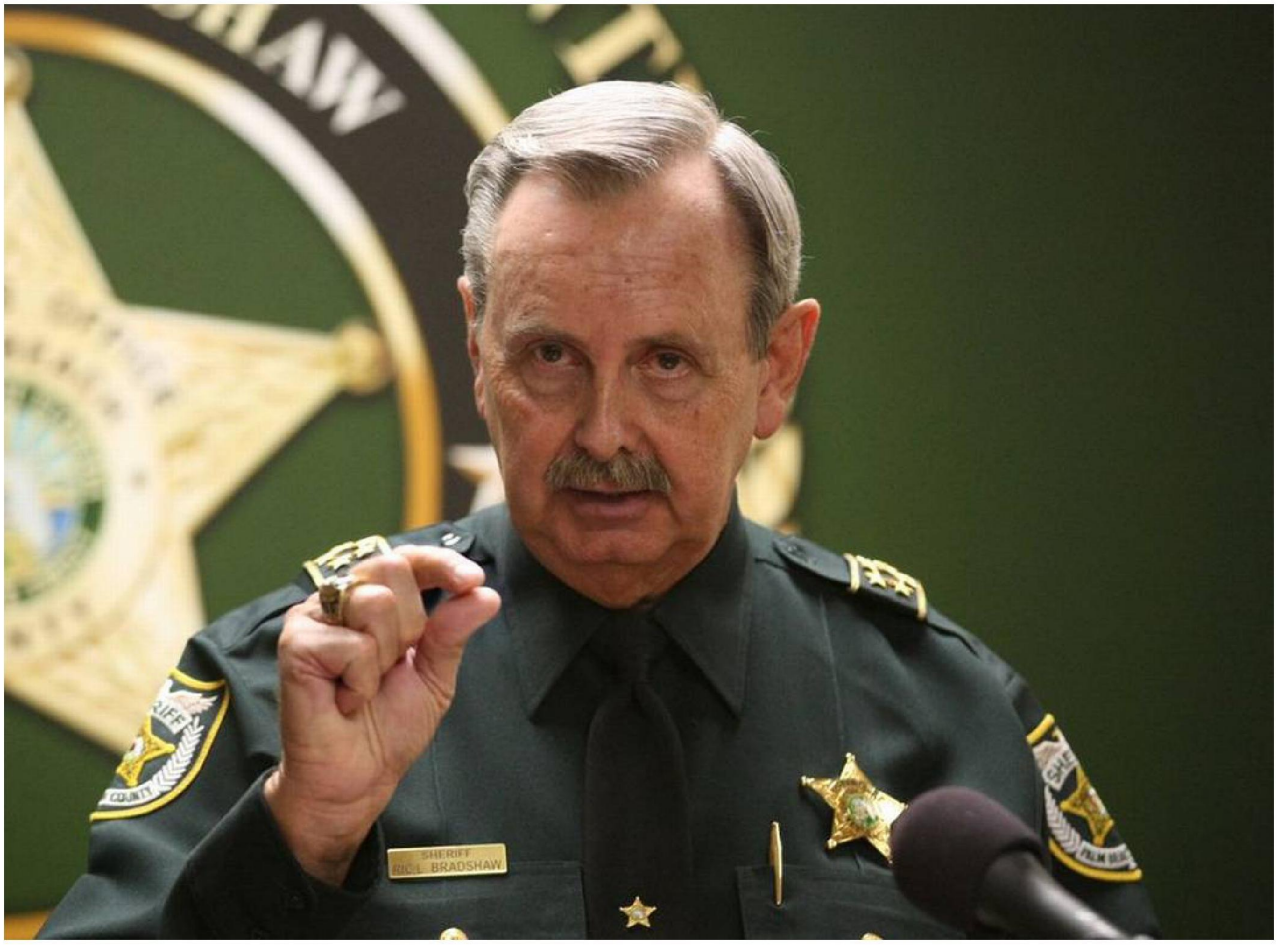
While officially confined to the Palm Beach County stockade, serving time for his sex offenses, Jeffrey Epstein was allowed to spend half his day at this West Palm Beach office building. It was called work release, although Palm Beach Sheriff's Office rules prohibit work-release status for sexual offenders. Emily Michot *EMICHOT@MIAMIHERALD.COM*

But the sheriff's own work release policy — a copy of which Barbera provided to the Herald — specifically notes that sex offenders aren't eligible for work release.

At first, Barbera questioned whether Epstein was a sex offender at all, noting that he didn't have to register officially until after his release from the jail in 2009. But his court papers clearly listed him as a sex offender. In fact, the papers Epstein signed — obtained by the Herald — included all the laws governing registered sex offenders in Florida.

Barbera refused to explain why Epstein was seemingly allowed to deviate from the agency's policies. She also would not respond to requests for an accounting of the amount of money that Epstein paid the sheriff's office for his private details.

Palm Beach Sheriff Ric Bradshaw, who has been in office since 2004 — and is widely considered to be one of the most powerful people in the county — did not respond to requests for comment.



A spokeswoman for Palm Beach County Sheriff Ric Bradshaw declined to say why Jeffrey Epstein was allowed work-release status despite rules prohibiting work release for sex offenders. Taylor Jones *PALM BEACH POST*

Epstein's registration requirements are somewhat confusing, even to those who are responsible for keeping his registration. The Florida Department of Law Enforcement, which keeps the online registry, and the Palm Beach County Sheriff's Office, where Epstein has to register in person twice a year, gave

conflicting explanations over the past six months about who is responsible for ensuring that he is complying with the law.

On Nov. 14, the Herald asked the sheriff's office for a full accounting of Epstein's check-ins for 2018. The record the office supplied two days later showed he registered in January and in July — as required. But PBSO also inexplicably had him registering on Nov. 14 — the very same day that the Herald asked for the records from the sheriff's office.

When asked about this sudden registration, Barbera replied: "The information we provided you was a snapshot from the FDLE website. Perhaps, someone from FDLE can provide a reason for you.''

Said FDLE spokeswoman Gretl Plessinger in an email: "The screenshot is not on the public registry. This is information inputted by the local agency when the offender comes into the local sheriff's office to register.''

Plessinger said Epstein is not covered by the state's new three-day rule, which requires sex offenders to re-register when they come to stay in Florida for three days or more. His town of Palm Beach home is already on file, as a temporary residence, she said.

So it's not clear why he would have suddenly registered a third time on Nov. 14.

State Sen. Lauren Book, a child sex abuse survivor and vocal advocate for tough sex offender monitoring, called the case an appalling example of how those in the justice system allow wealthy people to skirt the law and bend the rules.

"These prosecutors, and judges and sheriffs who are making these decisions and allowing things to fly — we have to hold these people accountable. They are supposed to uphold the law — regardless of who a person is and how much money they have in the bank or who they had on their airplane.''

Piece by piece

Over the years, Courtney Wild, Virginia Roberts and more than a dozen other women who say they were victims of Epstein have been quietly challenging the traditional legal norms that have failed to punish Epstein and other men in positions of power for sexual abuse.

Epstein has paid millions of dollars in civil compensation that, for the most part, has kept the details about his operation out of the public eye. As a result, much — but not all — of the testimony and evidence collected as part of the vast litigation has been sealed or redacted from public court records.

The girls who were abused by Jeffrey Epstein and the cops who championed their cause remain angry over what they regard as a gross injustice, while Epstein's employees and those who engineered his non-prosecution agreement have prospered.

By

Taking a page from Epstein's legal team, lawyers representing Epstein's victims hired private investigators and former police detectives to dig into Epstein's life. Over the past decade, they've tracked down hundreds of people, including dozens of other potential victims; they've interviewed Epstein's recruiters, bookkeepers, housekeepers, butlers, pilots and drivers. They've traveled around the country and the world, taking statements and sworn depositions, coaxing people to talk who had previously been too reticent to come forward.

In short, they did what criminal prosecutors didn't do.

Some of the information they've learned was given to federal authorities in New York. Edwards said those authorities have shown no interest in opening a new investigation focused on crimes he is alleged to have committed in that state, where he is listed as a level 3 sex offender, the most dangerous category, considered at risk to re-offend, records show. In New York, he has to register every 90 days.

Virginia Roberts holds a photo of herself at age 16, when she says Palm Beach multimillionaire Jeffrey Epstein began abusing her sexually. Emily Michot *EMICHOT@MIAMIHERALD.COM*

Holding abusers accountable

In 2015, Roberts sued Maxwell for defamation in New York after Maxwell called her a liar in a news interview. The civil lawsuit was an effort by Roberts not just to clear her name, but an attempt to prove that Epstein and Maxwell operated an international underage sex trafficking operation. The lawsuit was settled out of court in 2017 and nearly all the evidence presented in the case has been sealed.

Roberts' attorney, Sigrid McCawley, claims that Roberts received a sizable settlement, although the amount is confidential.

"She wanted to hold her abusers accountable and we were able to do that by bringing this case ... which we ultimately settled very successfully for her,'' said McCawley, an associate of noted Bush-Gore recount lawyer David Boies, who has also pursued cases against Epstein in federal court in New York.

Maxwell's lawyer, Laura Menninger, declined to comment, referring the Herald to the court history.

"[Roberts] fabricated a story of abuse at the hands of Ms. Maxwell in exchange for hundreds of thousands of dollars from British tabloids with a motive for selling papers and advertisements and without regard for truth, veracity or substantiation,'' Menninger noted in a 2016 response filed in the case.

In February, the Miami Herald filed a federal court motion in the Southern District of New York, seeking access to documents that were sealed in the Maxwell case. The motion, which was not opposed by Roberts, could have cast light on the full scope of Epstein's possible sex trafficking operation, who was involved and whether it was covered up. Maxwell has opposed the Herald's motion, which was denied in August.

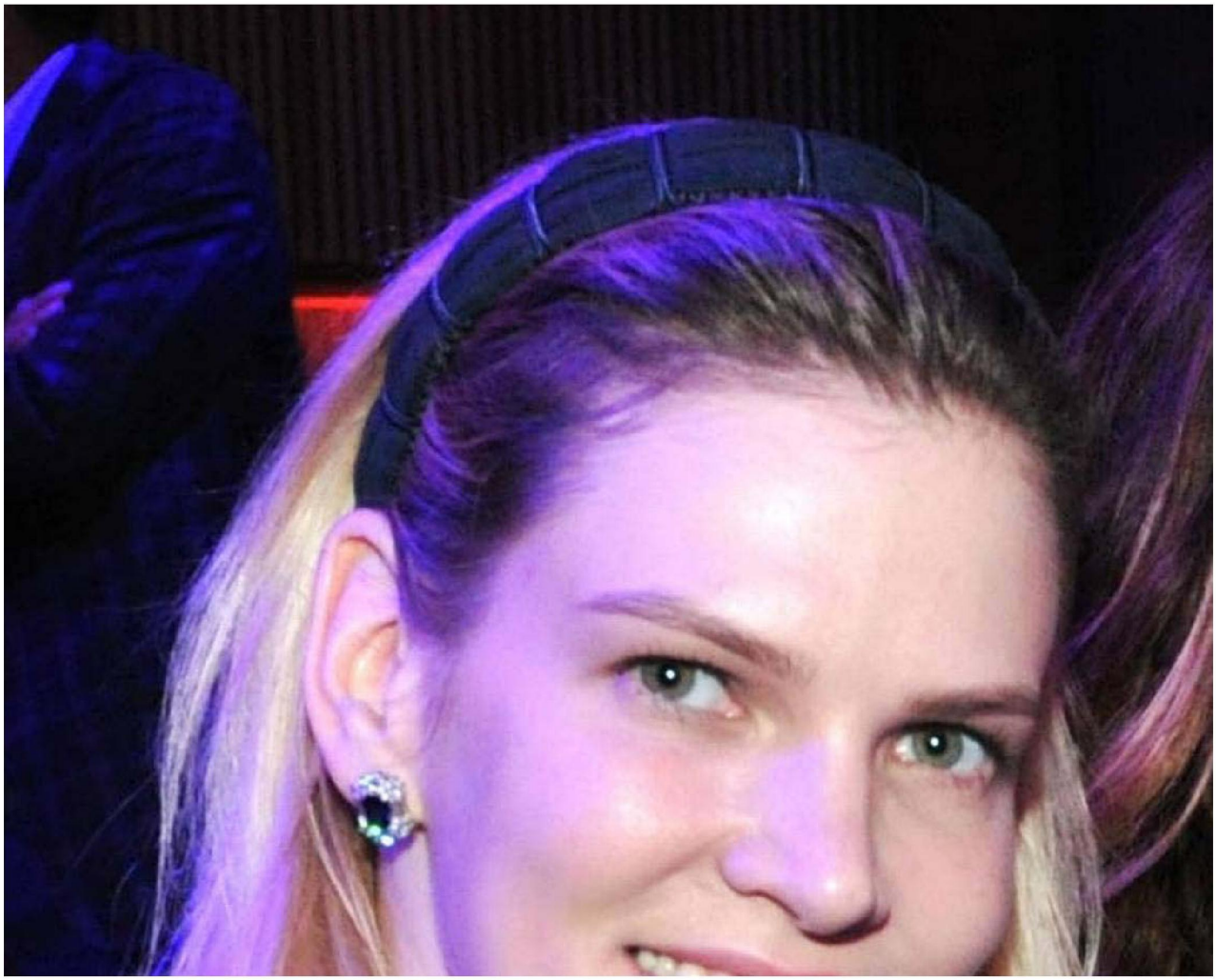
The Herald is appealing.

Today, Epstein has a new private jet, which takes him around the world. Flight records show that he spends most of his time on his private island, Little St. James in the U.S. Virgin Islands, which he now lists as his permanent residence. He is registered in New York and the U.S. Virgin Islands as a sex offender. New Mexico, where he owns a sprawling ranch, does not list him as a convicted sex offender.

As part of its investigation, the Herald learned that in 2013, the federal government conceded that it had given Epstein what it called "valuable consideration" for information he provided to the FBI as part of his plea deal. The documents do not elaborate, but Epstein — a hedge fund manager who once worked for the investment firm Bear Stearns — was listed as a key investor who lost money in the financial crash of 2008.

Francey Hakes, a former federal child sex crimes prosecutor, said any consideration the government gave to Epstein should be made public.

"The public has a right to know why he got a slap on the wrist, and what was the interest that was so great that allowed him to not get prosecuted?"



Nadia Marcinkova, now a professional pilot, worked for Jeffrey Epstein when he was molesting young women. Victims told police Marcinkova would participate in sex acts, often as Epstein choreographed every move. Jerod Harris

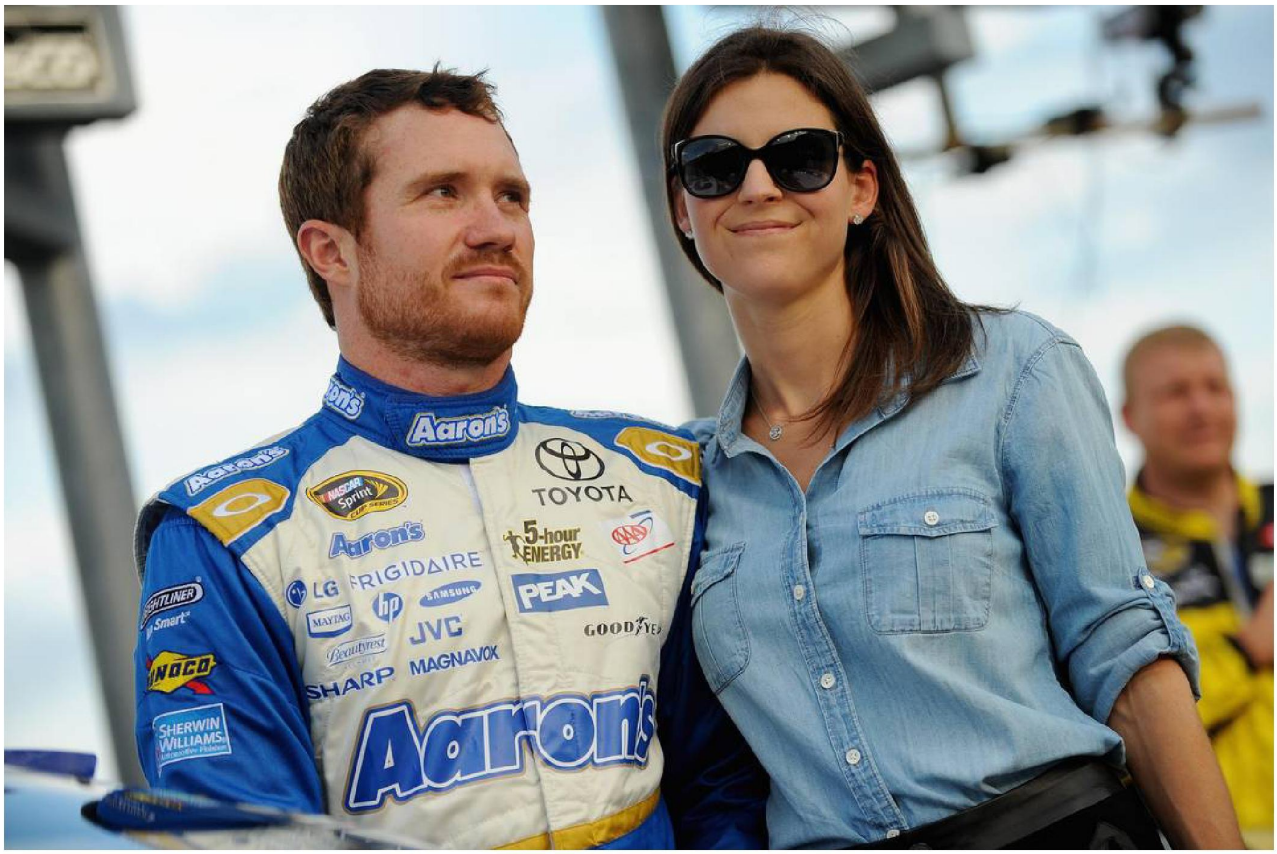
In recent years, Epstein has been traveling the world in his new Gulfstream V jet. He has been active in various charitable causes and scientific research projects. The Jeffrey Epstein VI Foundation, based in the U.S. Virgin Islands, has helped fund NeuroTV, an online network that features interviews with academics and scientists.

Then and now

Both Nadia Marcinkova and Sarah Kellen changed their names after the scandal.

Marcinkova, 32, briefly became Marcinko. She visited Epstein more than 70 times when he was in Palm Beach custody. She went on to a career in real estate. And she is now an FAA-certified commercial pilot and flight instructor who goes by the name "Global Girl" on social media. (www.facebook.com/GlobalGirlAviation/)

Sarah Kellen, who used the name Kensington for a while, is now married to NASCAR driver Brian Vickers. The couple divides their time between homes in North Carolina, New York and Miami Beach.



NASCAR driver Brian Vickers and his wife, Sarah, take part in pre-race ceremonies in Sparta, Ky., on June 28, 2014. She was known as Sarah Kellen when she was an aide to Jeffrey Epstein. According to police, she scheduled visits of underage girls to Epstein's Palm Beach estate for massages that turned sexual. She was not charged with a crime. Will Schneekloth *GETTY IMAGES*

Maxwell, 56, transformed herself into an internationally known environmentalist. In 2012, she founded the TerraMar Project, a nonprofit environmental group that works to protect the world's oceans. In 2013, she gave a TED Talk on ocean conservation, discussing her diving expeditions around the world.

Dershowitz, 80, continues to lecture around the country. A professor emeritus at Harvard Law School, Dershowitz has been a frequent commenter on cable TV programs, often defending President Trump.

Prince Andrew, the Duke of York, 58, remained friends with Epstein, and in 2010, a photograph was taken of the two of them strolling in Manhattan. It was later revealed that Epstein had loaned the prince's ex-wife, Sarah Ferguson, $24,000 to pay off some debts. Ferguson later called the loan a "gigantic error of judgment."

Plain human beings

Crime victims' rights advocates have used the Epstein case to strengthen the federal law in recent years, adding more precise language mandating that prosecutors notify victims about plea bargains and allow victims to be heard at sentencing.

Because some statute-of-limitation laws set deadlines for filing civil and criminal sex crime cases, it's difficult to bring them years later, said Marci Hamilton, a University of Pennsylvania professor who is working to ease

those restrictions across the country.

Ghislaine Maxwell, daughter of a British press magnate and Jeffrey Epstein's close associate when he was inviting underage girls into his bedroom, leads a TED Talk on environmental issues.

But she points out that there has been no statute of limitations for federal sex crimes involving children since 2002.

Children who are sexually abused often take decades to reveal what happened to them, in part because their brains aren't wired at a young age to understand the trauma they've experienced, said Kenneth V. Lanning, a retired FBI agent who investigated and studied child sex crimes for 40 years.

"We want to hold children to some superhuman standard because they behave this way. In reality, police, prosecutors and judges have to understand that children are not all angels from heaven. They are just plain human beings who are emotionally immature so we have to protect them from their own decisions.''

Wild, who continues to fight her federal case on behalf of all of Epstein's victims, said she hopes that the federal judge hearing the Crime Victims' Rights case will make a ruling soon, one that will send a message to prosecutors who fail to consider the rights of crime victims.

"Really if you think about this too hard, it's scary because this is our government that is supposed to protect us but has done everything to protect a pedophile,'' she said.

Support investigative journalism

The Miami Herald obtained thousands of FBI and court records, lawsuits, and witness depositions, and went to federal court in New York to access sealed documents in the reporting of "Perversion of Justice." The Herald also tracked down more than 60 women who said they were victims, some of whom had never spoken of the abuse before.

Your digital subscription, starting at $0.99 for the first month, supports investigative journalism like this.

EXHIBIT 16

Miami Herald

An Epstein sex case is settled; Dershowitz denies latest allegation

BY JULIE K. BROWN

DECEMBER 19, 2018 8:30 PM, UPDATED DECEMBER 27, 2018 7:55 AM

Accused sex traffickers Jeffrey Epstein and Ghislaine Maxwell have settled a federal civil lawsuit filed by a woman who says she was ordered under threat of violence to have sex with them and other influential individuals when she was in her early 20s, sources confirmed Wednesday.

Sarah Ransome, who now lives in Barcelona, claimed that she was recruited and trafficked for sex by the pair in 2006 and 2007 — at the same time that Epstein, a wealthy New York hedge fund manager, was under federal investigation for molesting dozens of underage girls at his Palm Beach mansion.

Women who say they were victims of sexual abuse at the hands of Palm Beach multimillionaire Jeffrey Epstein want a judge to throw out his lenient plea deal. AP

According to a recent court transcript, among those people Ransome claims she was directed to have sex with was Epstein's lawyer, Alan Dershowitz, who helped negotiate a controversial plea

deal that gave the eccentric multimillionaire — and co-conspirators employed by Epstein — federal immunity in 2008.

Dershowitz, 80, told the Miami Herald that he has never met Ransome nor has he ever had sex with her. He accused Ransome's attorney, powerhouse lawyer David Boies, of inventing the story and using her and another woman, Virginia Roberts, to frame him. Roberts asserted in a federal court affidavit in 2015 that Epstein forced her to have sex with Dershowitz when she was 16 years old.

"I am the victim. David Boies and these women are the perpetrators," Dershowitz said. "They have willfully and deliberately concocted stories in order to make money — millions and millions of dollars. And I will not rest until the entire story comes out," said Dershowitz, a professor at Harvard Law School and frequent Fox news guest commentator.

Nowhere in the court case or the transcript does Ransome or anyone else allege that Ransome had sex with Dershowitz — only that she was directed to.

The Ransome settlement, which is confidential, comes two weeks after Epstein settled another lawsuit in Palm Beach, filed by an attorney who represented several women who said they were coerced into sex acts with Epstein when they were underage. As part of the settlement, Epstein, 65, issued an apology to Fort Lauderdale attorney Bradley Edwards, admitting that he leveled false claims in a lawsuit as part of an effort to intimidate Edwards into abandoning his aggressive advocacy for the women, who are now in their late 20s and early 30s.

The developments follow a series of stories published by the Miami Herald in late November that detailed how state and federal prosecutors worked with Epstein's lawyers to conceal the extent of Epstein's crimes, and secretly negotiated an unusual plea agreement that allowed him to escape federal sex trafficking charges that could have sent him to prison for life. The agreement, by design, was kept from his victims so that they could not appear at his sentencing.

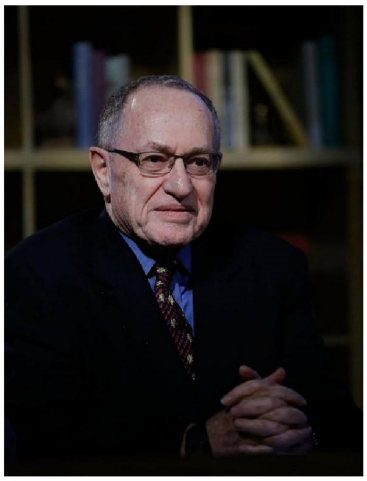
Last week, more than two dozen lawmakers in Washington demanded a federal investigation into that plea deal, which was negotiated, signed and sealed by former Miami U.S. Attorney Alexander Acosta, now President Donald Trump's secretary of labor.

Acosta has not commented on the Herald story or on the calls for a probe into how he handled the Epstein case.

This week, a decade after defending Epstein, Dershowitz once again found himself in the spotlight amid the new allegations, mentioned briefly in a court filing on Nov. 28, and first reported on Tuesday by the New York Daily News.

During a Nov. 7 hearing, Maxwell's lawyer, Laura Menninger, mentioned Dershowitz's name as among those "third parties" that Ransome claims she was instructed to have sex with, according to a transcript of the hearing obtained by the Herald.

On Tuesday, after the Daily News published its story, Dershowitz lashed out in dozens of posts on Twitter, denouncing Ransome as "delusional" and claiming that her lawyer, Boies, was retaliating against him because Dershowitz had filed a bar complaint against him.



Alan Dershowitz says he has never met the woman who alleges in a lawsuit she was ordered to have sex with influential men, including the famous lawyer. John Lamparski GETTY IMAGES/TNS

"Attorney David Boies threatened that unless I withdrew a bar complaint I had filed against him for falsely accusing me of sexual misconduct, he would find another woman to accuse me of similar misconduct. He has

now found an unbalanced woman who has delusions of having sex tapes of Donald Trump, Hillary Clinton, Bill Clinton and other prominent figures," Dershowitz said in a tweet.

Boies, best known for arguing on behalf of Vice President Al Gore in the 2000 Florida election recount, responded in an interview with the Herald:

"[Dershowitz's] charges are absurd. Either he has become totally unhinged or he thinks that if he says things that are loud enough and crazy enough it will distract attention from what he has done. There is no support — none — for what he says."

Ransome claimed that, in her early 20s, she was recruited to work as a masseuse for Epstein who, in exchange, promised he would help her get into fashion design in New York, according to her civil lawsuit, filed in January 2017. Epstein and Maxwell then kept her passport and threatened to ruin her life and physically harm her if she didn't have sex with them and others in 2006 and 2007, Ransome said in the complaint.

The complaint alleges that this all occurred at the same time as Epstein's lawyers were negotiating with Acosta and other federal prosecutors for a deal to avoid federal sex trafficking charges in connection with a scheme in which he lured underprivileged girls, mostly 13 to 16, to his home in Palm Beach under the pretense that he would pay them $200 to $300 for massages. Instead, police in Palm Beach found that he had been molesting and sexually abusing dozens of girls between 2001 and 2007.

In this photograph, Virginia Roberts socializes with Prince Andrew as Jeffrey Epstein associate Guislaine Maxwell stands in the background. Roberts claims she was effectively used as a sex slave by Epstein. In that capacity she had sex with the prince, Roberts says. The prince denied that. COURTESY OF VIRGINIA ROBERTS

Under the plea deal, known as a non-prosecution agreement, Epstein was allowed to plead guilty in state court to two prostitution charges. He served 13 months in a private wing of the Palm Beach County jail, where he was given liberal work release privileges. The deal also quashed an FBI investigation into whether Epstein was operating an international sex trafficking organization, the Herald found as part of its yearlong investigation.

"Even as [Epstein, Maxwell and other defendants] and their attorneys were busy arguing Epstein's innocence and publicly defaming his victims as liars...defendants merely changed their location" from Palm Beach to "other places in the U.S. [including the Southern District of New York] and abroad and brought them to Epstein's mansion in New York City and his private island in the Virgin Islands," Ransome's complaint alleged.

Dershowitz, in interviews with the Herald, and in recent public statements, said he has never met Ransome. He also said she initially tried to interest the New York Post in her story, but a reporter whom he said he spoke with told him Ransome was not credible. He said he has a trove of emails between Ransome and the reporter that prove she is a "lunatic."

"There are hundreds of emails in which she claimed to have sex with everybody in the world and also claimed she has video of Hillary Clinton, Bill Clinton, Donald Trump and others having sex with underage girls — but she never ever accused me in these emails," Dershowitz said.

The emails are under seal, he said, and therefore cannot be made public. Dershowitz said he has asked the court to unseal them but his efforts thus far have been unsuccessful.

In the recent court transcript, however, it is Maxwell's attorney, Laura Menninger — not Ransome or her attorneys — who named Dershowitz.

"[Ransome] has alleged not only that my client [Maxwell] ran a sex trafficking organization but she claims also that she was directed by my client and the Epstein defendants to have sex with third parties, including Alan Dershowitz, for example," Menninger said. "And so to the extent my client or Mr. Dershowitz or anyone else is going to be asked about their private sexual activity, I believe that would implicate their privacy rights..."

Roberts, who now lives in Australia, said that Epstein ordered her to have sex with Dershowitz six times, according to a 2015 affidavit, which was filed in connection with an unrelated Epstein federal lawsuit.

At that time, Dershowitz launched a media blitz on TV asserting that Roberts made up the story. He also called for Roberts' lawyers — Edwards and University of Utah law professor Paul Cassell — to be disbarred. The lawyers sued Dershowitz for defamation, and the case was settled last year.

Dershowitz publicly declared he was vindicated after a federal judge ordered Roberts' affidavit stricken from the court record. But the judge did not address the veracity of her sexual misconduct claims; he instead ruled that the affidavit was misplaced in a case not involving Dershowitz.

Boies, whose firm represented Roberts pro bono, addressed Dershowitz's longstanding contention that he had been exonerated.

"Anytime in a lawsuit where you were the defendant and you paid the plaintiff $900,000 to settle it — that's a strange kind of vindication," Boies said, asserting that Dershowitz paid that amount as part of the defamation settlement with Edwards and Cassell.

In 2016, Dershowitz released a statement following what he said was "an independent investigation" that had been conducted by former FBI Director Louis Freeh, who is now a private consultant.

"Our investigation found no evidence to support the accusations of sexual misconduct against Professor Dershowitz. In fact, in several instances, the evidence directly contradicted the accusations made against him," Freeh wrote.

Most of the court records in the Roberts case are sealed. In February, the Miami Herald filed a motion in the Southern District of New York, seeking access to documents. The motion, which was not opposed by Roberts, could shed more light on the full scope of Epstein's crimes and who was involved.

The motion was denied. The Herald is appealing.

https://www.miamiherald.com/latest-news/article223315075.html

EXHIBIT 3

Alan Dershowitz: ‘I never had sex with Virginia Roberts’ | Miami Herald

miamiherald.com/opinion/letters-to-the-editor/article222532470.html

In its series on the Jeffrey Epstein case, “Perversion of Justice,” the Herald quotes an affidavit by Virginia Roberts — a woman I never met — claiming she had sex with me on Epstein’s island, ranch, plane and mansion. It then simply says I “denied” it.

In fact, I disproved it. I produced my travel, phone, credit card and TV appearance records, conclusively proving that I could not have been and was not in any of these places during the time Roberts knew Epstein. The former FBI director, assisted by a former assistant U.S. attorney and a chief federal marshal, reviewed these records and the other evidence and concluded that, “The totality of the evidence found during the investigation refutes the allegations.”

There is other evidence, currently under seal, that directly establishes my innocence. I am seeking to unseal emails between Roberts and a journalist, a book manuscript by Roberts and a legal brief that are smoking guns showing that I was “deliberately framed for financial reasons.”

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There is also irrefutable evidence that Roberts lied about other people for money. She told a British tabloid that she met Al and Tipper Gore on Epstein’s island and swore that she had dinner with Bill Clinton on the island. But Secret Service records prove that none of these people were on the island. Indeed, the Gores didn’t even know Epstein.

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I have a tape recording of a conversation with Roberts’ closest friend in which she says that Roberts told her she “felt pressure to go after [Dershowitz]” in order to obtain money from a wealthy businessman, and that Roberts had never previously included me among the people with whom she claimed to have had sex.

Finally, one of Roberts’ own lawyers has acknowledged in front of witnesses that her claims against me are “wrong” “simply wrong.”

The evidence of my innocence is indisputable: I never met Roberts; I never had sex with her; she simply made up the entire story for money.

Roberts made her false claims against me in court documents that immunize her from being sued for defamation. I challenge her to repeat her false accusations out of court, so that I can sue her for defamation and let a jury decide — after seeing all the evidence,

including the suppressed emails and book manuscript — who is telling the truth and who is lying.

From: J [jeevacation@gmail.com]
Sent: 4/23/2019 9:55:44 AM
To: Steve Bannon [redacted]
Subject: Re: Netflix/Jeffrey Epstein

patterson book on my a flop and his work with clinton worse. hes old. but has a name. there is also john conally. hes on it as well

On Tue, Apr 23, 2019 at 11:54 AM Steve Bannon <[redacted]> wrote:
and Patterson's not!!

On Apr 23, 2019, at 5:53 AM, J <jeevacation@gmail.com> wrote:

berlinger is a bit of a hack. when you get a moment give me a call

On Tue, Apr 23, 2019 at 11:34 AM Steve Bannon <[redacted]> wrote:
Patterson , the Perversion of Justice Team , and the guy making the 'Ted Bundy' film --- sounds like a potential hagiography

On Apr 23, 2019, at 3:32 AM, J <jeevacation@gmail.com> wrote:

---------- Forwarded message ---------
From: **Peggy Siegal** <[redacted]>
Date: Tue, Apr 23, 2019 at 4:08 AM
Subject: Fw: Netflix/Jeffrey Epstein
To: Jeffrey Epstein <jeevacation@gmail.com>

Jeffrey....how much do you know about this?
When can I call you tomorrow? I know nothing but have friends at Netflix.

Eleanora Kennedy called me today....out of the blue...and told me the film makers wanted to talk to me. I know director Joe Berlinger, not well, but may have done a screening on one of his films. Would have to check.

I am around all day tomorrow.
xoxo Peggy

From: Timothy Jones <[redacted]>
Sent: Monday, April 22, 2019 4:16 PM
To: [redacted]
Subject: Netflix/Jeffrey Epstein

Dear Peggy,

My good friend Eleanora reached out to you on my behalf and I appreciate you wanting to hear more about this project.

I am a TV journalist who covered the Epstein story for several years and wrote a best selling book about him with James Patterson in 2016.

Jim Patterson and I are now consulting on a four hour Netflix documentary series tentatively set to air towards the end of the year.

The showrunner, Lisa Bryant, is working with director Joe Berlinger whose work I am sure you are familiar with, to produce a fair and balanced, in-depth recounting of the Epstein saga that, as you know, has every possible dramatic angle and is a story like no other.

We thought of you because of your remarkable reputation in the public relations and show business world and the fact that you were an acquaintance of Jeffrey Epstein.

The tawdry side of the story has been told...We hope you can give us some insight and context into who he was before his life fell apart.

I am sure that Lisa Bryant,Joe Berlinger and Jim Patterson would all make themselves available to get on a call with you this week.

Jim is in Florida,and Joe is traveling overseas for his Ted Bundy film.
Lisa is in New York and would be happy to meet you in person as would I.

Thanks for giving this your consideration.

Best,
Tim Malloy

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tain general jurisdiction over them, all claims asserted against those individual defendants are dismissed for lack of personal jurisdiction.

3. *Plaintiffs Are Entitled to Jurisdictional Discovery as to Privatbank's Investing Activities in the United States*

[37] Plaintiffs point out that Privatbank's website and its 2001 Annual Report state that Privatbank engages in transactions involving securities issued in the United States. (2001 Annual Report at 3, attached to Affidavit of Frances E. Bivens at Exhibit B). There is no allegation that transactions are related to the claims asserted here. Accordingly, they are only relevant to this Court's determination of whether the exercise of general jurisdiction over Privatbank is warranted pursuant to Rule 4(k)(2) for having such "continuous and systematic general business contacts" with the United States. *See Aerogroup Int'l, Inc.*, 956 F.Supp. at 439.

Because plaintiffs have identified a genuine issue of jurisdictional fact, the question of general jurisdiction cannot be resolved on the pleadings and affidavits alone. Thus, plaintiffs are entitled to jurisdictional discovery regarding the extent of defendant Privatbank's general business contacts with the United States in the years 1992—1998, a period that includes the relevant period in this action and five preceding years. *See In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d at 207–08; *see also, Metropolitan Life Ins. Co.*, 84 F.3d at 569–70 (holding that the time period relevant for determining extent of a defendant's contacts for general jurisdiction purpose should include a number of years prior to the events giving rise to the claims asserted).

IV. CONCLUSION

For the reasons set forth above, the Sovereign defendants' motion to dismiss is granted in part and denied in part. Plaintiffs' claims alleging takings in violation of international law, promissory estoppel, equitable estoppel, and unjust enrichment—counts seven, nine, and ten in the complaint—are hereby dismissed as against the Sovereign defendants. In addition, the motion of individual defendants Horath and Buchmann to dismiss the complaint for lack of personal jurisdiction is granted and all claims asserted against those defendants are hereby dismissed.

Because this Court finds that an issue of jurisdictional fact exists as to the existence of general jurisdiction pursuant to Rule 4(k)(2) as to corporate defendant Privatbank, its motion to dismiss is denied without prejudice to its renewal pending conclusion of jurisdictional discovery on that issue.

In re: TERRORIST ATTACKS ON SEPTEMBER 11, 2001

Burnett v. Al Baraka Inv. & Dev. Corp. Ashton v. Al Qaeda Islamic Army Tremsky v. Qsama Bin Laden Salvo v. Al Qaeda Islamic Army Burnett v. Al Baraka Inv. & Dev. Corp. Federal Insurance v. Al Qaida Barrera v. Al Qaeda Islamic Army Vigilant Insurance v. Kingdom of Saudi Arabia

Nos. 03 MDL 1570(RCC), 02 CIV. 1616, 02 CIV. 6977, 02 CIV. 7300, 03 CIV. 5071, 03 CIV. 5738, 03 CIV. 6978, 03 CIV. 7036, 03 CIV. 8591.

United States District Court,
S.D. New York.

Jan. 18, 2005.

Background: Survivors, family members, and representatives of victims of Septem-

ber 11, 2001 terrorist attacks, as well as insurance carriers, brought actions against al Qaeda, al Qaeda's members and associates, alleged state sponsors of terrorism, and individuals and entities who allegedly provided support to Al Qaeda, asserting causes of action under Torture Victim Protection Act (TVPA), Antiterrorism Act (ATA), Alien Tort Claims Act (ATCA), and Racketeer Influenced and Corrupt Organizations Act (RICO), as well as claims for aiding and abetting, conspiracy, intentional infliction of emotional distress, negligence, survival, wrongful death, trespass, and assault and battery. Actions were consolidated by Multidistrict Litigation Panel. Various defendants filed motions to dismiss.

Holdings: The District Court, Casey, J., held that:

(1) jurisdictional discovery was warranted on issue whether Saudi Arabian bank was immune under Foreign Sovereign Immunities Act (FSIA);

(2) claims against Saudi Arabia and two of its officials based on alleged contributions to charities were not subject to commercial activities exception of FSIA;

(3) complaint alleging that Saudi Princes contributed to charities that supported al Qaeda failed to allege causal connection sufficient to satisfy New York standard for concerted action liability, for purposes of torts exception of FSIA;

(4) claims against Saudi Arabian Prince arising from alleged contributions to charities were barred by discretionary function exception to torts exception of FSIA;

(5) claims against Saudi Arabian Prince arising from alleged decisions regarding treatment of Taliban and al Qaeda leader were barred by discretionary function exception to torts exception of FSIA;

(6) claims against Saudi Arabia arising from alleged decisions to make charitable contributions were barred by discretionary function exception to torts exception of FSIA;

(7) survivors failed to make prima facie showing necessary to establish personal jurisdiction over Princes and others under New York's long-arm statute;

(8) modified due process standard appropriate for mass torts would not be applied to question of personal jurisdiction;

(9) allegations were insufficient to establish general personal jurisdiction over Princes;

(10) survivors failed to establish personal jurisdiction over founder of Saudi Arabian company;

(11) limited discovery would be permitted with regard to whether Saudi Arabian bank's contacts with United States were sufficient for exercise of personal jurisdiction;

(12) survivors failed to establish personal jurisdiction over director of charity;

(13) jurisdictional discovery was warranted to determine if Saudi Arabian construction company purposefully directed its activities at United States;

(14) jurisdictional discovery was warranted to determine which of charitable network's entities had presence in Virginia, for purposes of personal jurisdiction;

(15) survivors made prima facie showing of personal jurisdiction over bank chairman;

(16) survivors failed to state cause of action under RICO;

(17) attacks were extreme and outrageous, as required for intentional infliction of emotional distress;

(18) survivors failed to state cause of action under ATA against banks; and

(19) survivors stated cause of action against bank chairman under ATA.

Order accordingly.

1. Federal Courts ⚷157

Although district court would review and give deference to opinion issued by judge of another district court prior to transfer of case by Multidistrict Litigation Panel, district court was required to evaluate motions to dismiss on merits de novo, and was bound by Second Circuit law, not District of Columbia law, which was applied by the other district court. 28 U.S.C.A. § 1407; Fed.Rules Civ.Proc.Rule 12(b), 28 U.S.C.A.

2. International Law ⚷10.38

Under the Foreign Sovereign Immunities Act (FSIA), a foreign state and its instrumentalities are presumed immune from United States courts' jurisdiction. 28 U.S.C.A. § 1602 et seq.

3. International Law ⚷10.31

The exceptions to immunity provided by the Foreign Sovereign Immunities Act (FSIA) provide the sole basis for obtaining subject matter jurisdiction over a foreign state and its instrumentalities in federal court. 28 U.S.C.A. § 1602 et seq.

4. International Law ⚷7

A federal court must inquire at the threshold of every action against a foreign state whether the exercise of its jurisdiction is appropriate.

5. International Law ⚷10.38

On a motion to dismiss challenging subject matter jurisdiction under the Foreign Sovereign Immunities Act (FSIA), the defendant must first present a prima facie case that it is a foreign sovereign; in response, the plaintiff must present evidence that one of the statute's exceptions nullifies the immunity. 28 U.S.C.A. § 1602 et seq.; Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

6. International Law ⚷10.38

In challenging the District Court's subject matter jurisdiction under the Foreign Sovereign Immunities Act (FSIA) on a motion to dismiss, the defendants retain the ultimate burden of persuasion. 28 U.S.C.A. § 1602 et seq.; Fed.Rules Civ. Proc.Rule 12(b)(1), 28 U.S.C.A.

7. International Law ⚷10.38

The District Court must consult outside evidence if resolution of a proffered factual issue may result in the dismissal of a complaint, pursuant to the Foreign Sovereign Immunities Act (FSIA), for lack of jurisdiction. 28 U.S.C.A. § 1602 et seq.; Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

8. Federal Civil Procedure ⚷1264

A delicate balance exists between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign's or sovereign's agency's legitimate claim to immunity from discovery. 28 U.S.C.A. § 1602 et seq.

9. International Law ⚷10.38

In deciding whether a defendant is entitled to immunity under the Foreign Sovereign Immunities Act (FSIA), the District Court gives great weight to any extrinsic submissions made by the foreign defendant regarding the scope of his official responsibilities. 28 U.S.C.A. § 1602 et seq.

10. International Law ⚷10.33

Director of Saudi Arabia's Department of General Intelligence (DGI) was immune from Antiterrorism Act (ATA) suit by survivors of victims of Septem-

ber 11, 2001 attacks for his official acts, notwithstanding that he was also Saudi Arabia's ambassador to United Kingdom, unless exception to Foreign Sovereign Immunities Act (FSIA) applied. 18 U.S.C.A. § 2331 et seq.; 28 U.S.C.A. § 1603.

11. International Law ⚷10.33

Saudi Arabia's Minister of Defense and Aviation, as third-highest ranking member of Saudi government, was immune from Antiterrorism Act (ATA) suit by survivors of victims of September 11, 2001 attacks for his official acts, unless exception to Foreign Sovereign Immunities Act (FSIA) applied. 18 U.S.C.A. § 2331 et seq.; 28 U.S.C.A. § 1603.

12. International Law ⚷10.34

Saudi Arabia's ownership of bank was required to be direct for bank to enjoy immunity, pursuant to Foreign Sovereign Immunities Act (FSIA), from Antiterrorism Act (ATA) suit by survivors of victims of September 11, 2001 attacks; that is, bank would not be immune as instrumentality of Saudi Arabia if its majority owner, known as Public Investment Fund (PIF), was agency, instrumentality, or organ of Saudi Arabia. 18 U.S.C.A. § 2331 et seq.; 28 U.S.C.A. § 1603(b)(2).

13. Federal Civil Procedure ⚷1264

Limited jurisdictional discovery was warranted, on Saudi Arabian bank's motion to dismiss Antiterrorism Act (ATA) suit filed by survivors of victims of September 11, 2001 attacks, on issue whether bank was immune under Foreign Sovereign Immunities Act (FSIA), where resolution of status of bank's majority owner was not determinable on current record, majority owner might qualify either as organ or political subdivision of Saudi Arabia, and parties' affidavits had not been subjected to cross examination and were self-serving. 18 U.S.C.A. § 2331 et seq.; 28 U.S.C.A. § 1603(b)(2); Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

14. International Law ⚷10.33

In deciding whether to apply the commercial activities exception to the Foreign Sovereign Immunities Act (FSIA), courts must inquire whether the foreign state's actions are the type of actions by which a private party engages in trade and traffic or commerce. 28 U.S.C.A. § 1605(a)(2).

15. International Law ⚷10.33

To extent that Antiterrorism Act (ATA) claims against Saudi Arabia and two of its government officials by survivors of victims of September 11, 2001 attacks were based on defendants' alleged contributions to charities, those alleged acts were not commercial and thus were not subject to commercial activities exception of Foreign Sovereign Immunities Act (FSIA), even if alleged acts constituted money laundering. 18 U.S.C.A. §§ 1956, 2331 et seq.; 28 U.S.C.A. § 1605(a)(2).

16. International Law ⚷10.33

For purposes of the commercial activity exception to the Foreign Sovereign Immunities Act (FSIA), a commercial activity must be one in which a private person can engage lawfully. 28 U.S.C.A. § 1605(a)(2).

17. International Law ⚷10.33

Since money laundering is an illegal activity, it cannot be the basis for applicability of the commercial activities exception to the Foreign Sovereign Immunities Act (FSIA). 18 U.S.C.A. § 1956; 28 U.S.C.A. § 1605(a)(2).

18. International Law ⚷10.33

Foreign Sovereign Immunities Act (FSIA) exception for state sponsors of terrorism did not apply to Antiterrorism Act (ATA) claims against Saudi Arabia and two of its government officials by survivors of victims of September 11, 2001 attacks,

where parties agreed that Saudi Arabia had not been designated state sponsor of terrorism. 18 U.S.C.A. § 2331 et seq.; 28 U.S.C.A. § 1605(a)(7)(A).

19. International Law ⚷10.33

Generally, acts are "discretionary," for purposes of the discretionary function exception to the torts exception of the Foreign Sovereign Immunities Act (FSIA), if the acts are performed at the planning level of government, as opposed to the operational level. 28 U.S.C.A. § 1605(a)(5).

See publication Words and Phrases for other judicial constructions and definitions.

20. International Law ⚷10.33

To fit within the torts exception of the Foreign Sovereign Immunities Act (FSIA), plaintiffs must come forward with evidence demonstrating that the defendants' tortious acts or omissions caused the plaintiffs' injuries. 28 U.S.C.A. § 1605(a)(5).

21. International Law ⚷10.33

To extent that Saudi Arabian Princes' alleged donations to charities that supported terrorist organizations were made in Princes' personal capacities, Antiterrorism Act (ATA) claims arising from such alleged donations, asserted by survivors of victims of September 11, 2001 attacks, were not subject to protection of torts exception of Foreign Sovereign Immunities Act (FSIA). 18 U.S.C.A. § 2331 et seq.; 28 U.S.C.A. § 1605(a)(5).

22. Conspiracy ⚷1.1
Torts ⚷21

In New York, conspiracy and aiding and abetting are varieties of concerted action liability, for which there must be: (1) an express or tacit agreement to participate in a common plan or design to commit a tortious act; (2) tortious conduct by each defendant; and (3) the commission by one of the defendants, in pursuance of the agreement, of an act that constitutes a tort.

23. Conspiracy ⚷2

Under New York law, liability for conspiracy requires an agreement to commit a tortious act.

24. Torts ⚷21

Under New York law, aiding and abetting liability requires that the defendant have given substantial assistance or encouragement to the primary wrongdoer.

25. International Law ⚷10.43

Antiterrorism Act (ATA) complaint by survivors of victims of September 11, 2001 attacks, alleging that Saudi Princes contributed to charities that supported al Qaeda, and that al Qaeda repeatedly and publicly targeted United States, failed to allege causal connection sufficient to satisfy New York standard for concerted action liability, for purposes of torts exception of Foreign Sovereign Immunities Act (FSIA), absent allegations from which it could be inferred that Princes knew charities were fronts for al Qaeda. 18 U.S.C.A. § 2331 et seq.; 28 U.S.C.A. § 1605(a)(5).

26. International Law ⚷10.43

To allege a causal connection sufficient to invoke the torts exception of the Foreign Sovereign Immunities Act (FSIA), in connection with a defendant's contributions to organizations that are not themselves designated terrorists, there must be some facts presented to support the allegation that the defendant knew the receiving organization to be a solicitor, collector, supporter, front or launderer for such an entity; there must be some facts to support an inference that the defendant knowingly provided assistance or encouragement to the wrongdoer. 28 U.S.C.A. § 1605(a)(5).

27. International Law ⚷10.43

Plaintiffs may not circumvent the jurisdictional hurdle of the Foreign Sovereign Immunities Act (FSIA) by inserting vague and conclusory allegations of tortious conduct in their complaints, and then relying on the federal courts to conclude that some conceivable non-discretionary tortious act falls within the purview of these generic allegations under the applicable substantive law. 28 U.S.C.A. § 1605(a)(5).

28. International Law ⚷10.33

In determining whether functions are discretionary, for purposes of the discretionary function exception to the torts exception of the Foreign Sovereign Immunities Act (FSIA), the District Court must decide whether the actions involved an element of choice or judgment based on considerations of public policy. 28 U.S.C.A. § 1605(a)(5).

29. International Law ⚷10.33

Alleged decisions to make charitable contributions to terrorist organizations, made by Saudi Arabian Prince, as chairman of Supreme Council of Islamic Affairs, which was charged with making recommendations to Council of Ministers regarding requests for aid from Islamic organizations located abroad, and as head of Special Committee of Council of Ministers, which was charged with deciding which grants should be made to Islamic charities, were discretionary, such that Antiterrorism Act (ATA) claims against Prince by survivors of victims of September 11, 2001 attacks arising from such alleged contributions were barred by discretionary function exception to torts exception of Foreign Sovereign Immunities Act (FSIA). 18 U.S.C.A. § 2331 et seq.; 28 U.S.C.A. § 1605(a)(2).

30. International Law ⚷10.33

Alleged decisions regarding treatment of Taliban and al Qaeda leader made by Saudi Prince, as head of Saudi Arabia's Department of General Intelligence (DGI), were discretionary, such that Antiterrorism Act (ATA) claims against Prince by survivors of victims of September 11, 2001 attacks arising from such alleged decisions were barred by discretionary function exception to torts exception of Foreign Sovereign Immunities Act (FSIA). 18 U.S.C.A. § 2331 et seq.; 28 U.S.C.A. § 1605(a)(2).

31. International Law ⚷10.33

Saudi Arabia's decisions to make charitable contributions to organizations that allegedly supported terrorism were discretionary, such that Antiterrorism Act (ATA) claims against Saudi Arabia by survivors of victims of September 11, 2001 attacks arising from contributions were barred by discretionary function exception to torts exception of Foreign Sovereign Immunities Act (FSIA). 18 U.S.C.A. § 2331 et seq.; 28 U.S.C.A. § 1605(a)(2).

32. International Law ⚷10.32

A waiver of Foreign Sovereign Immunities Act (FSIA) immunity must be explicit. 28 U.S.C.A. § 1602 et seq.

33. Federal Courts ⚷96

Because motions to dismiss for lack of personal jurisdiction were brought before discovery and decided without evidentiary hearing, plaintiffs were required only to make prima facie showing that personal jurisdiction existed in order to survive motions. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

34. Federal Courts ⚷96

In responding to motions to dismiss for lack of personal jurisdiction brought before discovery and decided without evidentiary hearing, plaintiffs could rely en-

tirely on factual allegations, and would prevail even if defendants made contrary arguments. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

35. Federal Courts ⚷96

In resolving motions to dismiss for lack of personal jurisdiction, the district court reads the complaints and affidavits in a light most favorable to the plaintiffs. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

36. Federal Courts ⚷96

In resolving a motion to dismiss for lack of personal jurisdiction, the district court will not accept legally conclusory assertions or draw argumentative inferences. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

37. Federal Courts ⚷417

A federal court sitting in diversity exercises personal jurisdiction over a foreign defendant to the same extent as courts of general jurisdiction of the state in which it sits. Fed.Rules Civ.Proc.Rule 4(k)(1)(A), 28 U.S.C.A.

38. Courts ⚷12(2.20)

For New York's long-arm statute to provide a basis for personal jurisdiction in a civil conspiracy action, the plaintiffs are not required to establish the existence of a formal agency relationship between the defendants and their putative co-conspirators. N.Y.McKinney's CPLR 302(a)(2).

39. Courts ⚷12(2.20)

The bland assertion of conspiracy is insufficient to establish personal jurisdiction under New York's long-arm statute. N.Y.McKinney's CPLR 302(a)(2).

40. Courts ⚷12(2.20)

To establish personal jurisdiction on a conspiracy theory under New York's long-arm statute, the plaintiffs must make a prima facie showing of conspiracy, allege specific facts warranting the inference that the defendant was a member of the conspiracy, and show that the defendant's co-conspirator committed a tort in New York. N.Y.McKinney's CPLR 302(a)(2).

41. Courts ⚷12(2.20)

To warrant the inference that an out-of-state defendant was a member of a conspiracy, as required for a court to exercise personal jurisdiction under New York's long-arm statute on the basis of the acts of co-conspirators in New York, plaintiffs must show that: (1) the defendant had an awareness of the effects in New York of its activity; (2) the activity of the co-conspirators in New York was to the benefit of the out-of-state conspirators; and (3) the co-conspirators acting in New York acted at the direction or under the control or at the request of or on behalf of the out-of-state defendant. N.Y.McKinney's CPLR 302(a)(2).

42. Federal Courts ⚷94, 96

Allegations by victims' survivors, that various defendants, including Saudi Arabian Princes, conspired with al Qaeda terrorists to perpetrate September 11, 2001 attacks, failed to make prima facie showing necessary to establish personal jurisdiction as to Antiterrorism Act (ATA) claims under New York's long-arm statute, absent specific facts from which district court could infer that defendants directed, controlled, or requested al Qaeda to undertake its terrorist activities, or specific allegations of defendants' knowledge of or consent to those activities. 18 U.S.C.A. § 2331 et seq.; N.Y.McKinney's CPLR 302(a)(2).

43. Constitutional Law ⚷305(5)
Federal Courts ⚷76.5

For jurisdiction to exist under the rule establishing personal jurisdiction in any district court for cases arising under

federal law where the defendant has sufficient contacts with the United States as a whole but is not subject to jurisdiction in any particular state, there must be a federal claim, personal jurisdiction must not exist over the defendant in any state, and the defendant must have sufficient contacts with the United States as a whole such that the exercise of jurisdiction does not violate Fifth Amendment due process. U.S.C.A. Const.Amend. 5; Fed.Rules Civ. Proc.Rule 4(k)(2), 28 U.S.C.A.

44. Constitutional Law ⚷305(5)

To comply with the Due Process Clause, jurisdiction based on the Antiterrorism Act (ATA), or on the rule establishing personal jurisdiction in any district court for cases arising under federal law where the defendant has sufficient contacts with the United States as a whole but is not subject to jurisdiction in any particular state, requires minimum contacts with the United States, which may be established under a "personally directed" theory. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 2334(a); Fed.Rules Civ.Proc.Rule 4(k)(2), 28 U.S.C.A.

45. Constitutional Law ⚷305(5)
Federal Courts ⚷76.25, 86

Modified due process standard appropriate for mass torts would not be applied to question whether district court had personal jurisdiction over Saudi Arabian Princes and other defendants in Antiterrorism Act (ATA) action by survivors of victims of September 11, 2001 attacks, given questions as to defendants' contacts with forum and attenuated nature of their alleged involvement with al Qaeda. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 2331 et seq.

46. Constitutional Law ⚷305(4.1)

Any exercise of personal jurisdiction must comport with the requirements of due process. U.S.C.A. Const.Amend. 5.

47. Constitutional Law ⚷305(4.1)

Depending on the basis for personal jurisdiction, due process under either the Fifth or Fourteenth Amendment applies. U.S.C.A. Const.Amends. 5, 14.

48. Courts ⚷12(2.5)

Personal jurisdiction under the New York long-arm statute requires minimum contacts with New York pursuant to the Fourteenth Amendment. U.S.C.A. Const. Amend. 14; N.Y.McKinney's CPLR 302(a)(2).

49. Constitutional Law ⚷305(5)

Pursuant to the Fifth Amendment, personal jurisdiction, under the rule establishing personal jurisdiction in any district court for cases arising under federal law where the defendant has sufficient contacts with the United States as a whole but is not subject to jurisdiction in any particular state, requires contacts with the United States as a whole. U.S.C.A. Const.Amend. 5; Fed.Rules Civ.Proc.Rule 4(k)(2), 28 U.S.C.A.

50. Constitutional Law ⚷305(5)

The due process minimum contacts requirement is known as "fair warning," such that the defendant's contacts with the forum should be sufficient to make it reasonable to be haled into court there. U.S.C.A. Const.Amends. 5, 14.

51. Constitutional Law ⚷305(5)

The "fair warning" requirement of the Due Process Clause is satisfied if the defendant has purposefully directed his activities at the residents of the forum and the litigation results from alleged injuries that arise out of or relate to those activities. U.S.C.A. Const.Amends. 5, 14.

52. Constitutional Law ⚷305(5)
Federal Courts ⚷76.5, 76.10

For purposes of the minimum contacts inquiry required by the Due Process

Clause, a distinction is made between specific and general jurisdiction, such that "specific jurisdiction" exists when the forum exercises jurisdiction over the defendant in a suit arising out of the defendant's contacts with that forum, while "general jurisdiction" is based on the defendant's general business contacts with the forum; because the defendant's contacts are not related to the suit, a considerably higher level of contacts is generally required for general jurisdiction. U.S.C.A. Const. Amends. 5, 14.

See publication Words and Phrases for other judicial constructions and definitions.

53. Constitutional Law ⚷305(5)

In determining whether the exercise of personal jurisdiction is reasonable under the Due Process Clause, a court is to consider: (1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests in the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies. U.S.C.A. Const.Amends. 5, 14.

54. Federal Courts ⚷86

In general, great care and reserve should be exercised when extending notions of personal jurisdiction into the international field.

55. Federal Civil Procedure ⚷1267.1

In evaluating jurisdictional motions, district courts enjoy broad discretion in deciding whether to order discovery.

56. Federal Civil Procedure ⚷1269.1

Courts are not obligated to subject a foreign defendant to discovery where the allegations of jurisdictional facts, construed in plaintiffs' favor, fail to state a basis for the exercise of jurisdiction or where discovery would not uncover sufficient facts to sustain jurisdiction.

57. Federal Courts ⚷94

Allegations that Saudi Royal Family members owned substantial assets in and did substantial business in United States, and used profits therefrom to fund international terrorist acts, including those leading to September 11 attacks, and that Saudi Arabian Prince was ex-officio Chairman of Board of Saudi Arabia Airlines, which did business in United States and internationally, were insufficient to establish general personal jurisdiction over Prince in Antiterrorism Act (ATA) action by survivors of victims of September 11 attacks. 18 U.S.C.A. § 2331 et seq.

58. Federal Courts ⚷94

Allegations that Saudi Arabian Prince aided and abetted terrorism, and that he donated to charities that he knew to be supporters of international terrorism, were insufficient to establish personal jurisdiction under "purposefully directed activities" theory in Antiterrorism Act (ATA) action by survivors of victims of September 11, 2001 attacks. 18 U.S.C.A. § 2331 et seq.

59. Federal Courts ⚷94

Allegations that Saudi Arabian Prince donated money to charities were insufficient to establish personal jurisdiction in Antiterrorism Act (ATA) action by survivors of victims of September 11, 2001 attacks, absent specific factual allegations that he knew charities were funding money to terrorists. 18 U.S.C.A. § 2331 et seq.

60. Federal Courts ⚷86

Saudi Arabian Prince's alleged contacts with United States, during ten-year period prior to September 11, 2001 at-

tacks, consisting of one speech in United States, and handful of investments in United States through banks with which he was affiliated, were not sufficiently systematic and continuous for general personal jurisdiction in Antiterrorism Act (ATA) action by survivors of victims of attacks. 18 U.S.C.A. § 2331 et seq.

61. Federal Courts ⚷76.20, 86

Even assuming that district court had personal jurisdiction over Saudi Arabian financial institutions in Antiterrorism Act (ATA) action by survivors of victims of September 11, 2001 attacks, Saudi Arabian Prince's position as officer of such institutions was not basis for personal jurisdiction over him, where there was no allegation he had knowledge or involvement in any al Qaeda accounts at any banks he chaired. 18 U.S.C.A. § 2331 et seq.

62. Courts ⚷12(2.20)

The mere fact that a corporation is subject to jurisdiction in New York does not mean that individual officers may be hauled before New York courts without any showing that the individuals themselves maintained a presence or conducted business in New York.

63. Federal Courts ⚷96

Even assuming that name of founder of Saudi Arabian company appeared in "Golden Chain," which allegedly listed early direct donors to al Qaeda, such list was insufficient to establish personal jurisdiction in Antiterrorism Act (ATA) action by survivors of victims of September 11, 2001 attacks, absent indications of who wrote list, when it was written, or for what purpose it was written. 18 U.S.C.A. § 2331 et seq.

64. Federal Courts ⚷96

Appearance of Saudi Arabian watch retailer's name in "Golden Chain," which allegedly listed early direct donors to al Qaeda, was insufficient to establish personal jurisdiction in Antiterrorism Act (ATA) action by survivors of victims of September 11, 2001 attacks, inasmuch as list did not establish his involvement in terrorist conspiracy culminating in attacks and did not demonstrate that he purposefully directed his activities at United States. 18 U.S.C.A. § 2331 et seq.

65. Federal Courts ⚷97

Limited discovery would be permitted, at dismissal stage of Antiterrorism Act (ATA) action by survivors of victims of September 11, 2001 attacks, with regard to whether Saudi Arabian bank's contacts with United States were sufficient for exercise of personal jurisdiction consistent with due process, inasmuch as contacts, including former presence of bank's branch office and subsidiary in United States, bank's instigation of lawsuit in United States, and its advertisements in United States publications, when taken together, might establish personal jurisdiction. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 2331 et seq.; Fed.Rules Civ. Proc.Rule 12(b)(1), 28 U.S.C.A.

66. Federal Courts ⚷94

Allegations of survivors of victims of September 11, 2001 attacks were insufficient to establish personal jurisdiction over director of charity in Antiterrorism Act (ATA) action, inasmuch as complaint did not contain any specific actions by director from which district court could infer that he purposefully directed his activities at United States, his affiliations with entities that were alleged to have United States contacts would not sustain jurisdiction, and his being shareholder in United States company was not sufficient for jurisdiction. 18 U.S.C.A. § 2331 et seq.

67. Federal Courts ⚷94

Allegations of survivors of victims of September 11, 2001 attacks were insuffi-

cient to establish personal jurisdiction in Antiterrorism Act (ATA) action over individuals allegedly affiliated with Saudi Arabian construction company, inasmuch as complaint did not contain any factual allegations from which district court could infer that they purposefully directed their activities at United States, that they were members of conspiracy pursuant to New York long-arm statute, or that they had any general business contacts with United States. 18 U.S.C.A. § 2331 et seq.; N.Y.McKinney's CPLR 302(a)(2).

68. Federal Courts ⚷97

Jurisdictional discovery was warranted, at dismissal stage of Antiterrorism Act (ATA) action by survivors of victims of September 11, 2001 attacks, to determine if Saudi Arabian construction company purposefully directed its activities at United States for purposes of personal jurisdiction. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

69. Federal Courts ⚷97

Discovery would be permitted, at dismissal stage of Antiterrorism Act (ATA) action by survivors of victims of September 11, 2001 attacks, to determine which of charitable network's entities had presence in Virginia, and which entities transferred money to alleged al Qaeda operatives, for purposes of determining whether personal jurisdiction existed over network. Fed. Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

70. Federal Courts ⚷96

Survivors of victims of September 11, 2001 attacks made prima facie showing of personal jurisdiction over bank chairman in Antiterrorism Act (ATA) action, by alleging, inter alia, that Department of Treasury designated him as Specially Designated Global Terrorist, and that he was involved in United States operations of designated terrorist organization. 18 U.S.C.A. § 2331 et seq.

71. War and National Emergency ⚷50

To prove that defendants provided material support to terrorists, in violation of Antiterrorism Act (ATA), plaintiffs were required to present sufficient causal connection between that support and injuries suffered by plaintiffs; proximate cause would support such connection. 18 U.S.C.A. §§ 2339A(b), 2339B(g).

72. Conspiracy ⚷1.1

Torts ⚷21

To be liable for conspiracy or aiding and abetting under New York law, a defendant must know the wrongful nature of the primary actor's conduct, and the conduct must be tied to a substantive cause of action.

73. International Law ⚷10.11

Aircraft hijacking is generally recognized as violation of international law, for purposes of the requirement that an act be committed in violation of international law in order to be subject to the Alien Tort Claims Act (ATCA). 28 U.S.C.A. § 1350.

74. Racketeer Influenced and Corrupt Organizations ⚷75

Survivors of victims of September 11, 2001 attacks failed to allege injury from defendants' alleged investment of racketeering income, and thus failed to state cause of action in complaint for violations of Racketeer Influenced and Corrupt Organizations Act (RICO) provision prohibiting receipt of income derived from pattern of racketeering activity. 18 U.S.C.A. § 1962(a).

75. Racketeer Influenced and Corrupt Organizations ⚷50

A defendant must have had some part in directing the operation or management of the enterprise itself to be liable under the Racketeer Influenced and Corrupt Organizations Act (RICO) provision prohibit-

ing participation in the conduct of an enterprise's affairs through a pattern of racketeering activity. 18 U.S.C.A. § 1962(c).

76. Racketeer Influenced and Corrupt Organizations ⚷50

Allegations of complaint filed by survivors of victims of September 11, 2001 attacks, including that bank and charitable network may have assisted al Qaeda, failed to state cause of action under Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy provision, or provision prohibiting participation in conduct of enterprise's affairs through pattern of racketeering activity, in that allegations did not include anything approaching active management or operation. 18 U.S.C.A. § 1962(c, d).

77. International Law ⚷10.11

Only individuals may be sued under the Torture Victim Protection Act (TVPA). 28 U.S.C.A. § 1350 note.

78. International Law ⚷10.11

Survivors of victims of September 11, 2001 attacks failed to state cause of action in complaint against two individuals under Torture Victim Protection Act (TVPA), where there were no allegations individuals acted under color of law. 28 U.S.C.A. § 1350 note.

79. War and National Emergency ⚷50

To adequately plead the provision of material support under the Antiterrorism Act (ATA), a plaintiff has to allege that the defendant knew about the terrorists' illegal activities, the defendant desired to help those activities succeed, and the defendant engaged in some act of helping those activities. 18 U.S.C.A. § 2333(a).

80. Conspiracy ⚷7, 18

To state cause of action under Antiterrorism Act (ATA) pursuant to conspiracy theory, survivors of victims of September 11, 2001 attacks were required to allege that defendants were involved in agreement to accomplish unlawful act and that attacks were reasonably foreseeable consequence of that conspiracy; survivors did not have to allege that defendants knew specifically about attacks or that they committed any specific act in furtherance of attacks. 18 U.S.C.A. § 2333(a).

81. Death ⚷31(3.1)

Survivors of victims of September 11, 2002 attacks could state claims for wrongful death and survival under New York law if they were personal representatives of victims and sufficiently alleged that defendants supported, aided and abetted, or conspired with September 11 terrorists. N.Y.McKinney's EPTL 5–4.1, 11–3.2(b).

82. Assault and Battery ⚷21
Limitation of Actions ⚷31

The statute of limitations for assault and battery and intentional infliction of emotional distress claims under New York law is one year. N.Y.McKinney's CPLR 215(3).

83. Damages ⚷57.22

In actions for intentional infliction of emotional distress under New York law, courts are to determine whether the alleged conduct is sufficiently extreme and outrageous enough to permit recovery.

84. Damages ⚷57.25(1)

Attacks of September 11, 2001 were extreme and outrageous, as required for liability for intentional infliction of emotional distress under New York law.

85. Trespass ⚷30

To extent that survivors of victims of September 11, 2001 attacks sufficiently pled that defendants acted in concert with September 11 hijackers, they stated cause

of action for trespass under New York law pursuant to concerted action theory.

86. Damages ⚷57.14, 57.27

In New York, a plaintiff may establish negligent infliction of emotional distress under the bystander or direct duty theory.

87. Damages ⚷57.27

Under the bystander theory for proving negligent infliction of emotional distress under New York law, a defendant's conduct is negligent as creating an unreasonable risk of bodily harm to a plaintiff, and such conduct is a substantial factor in bringing about injuries to the plaintiff in consequence of shock or fright resulting from his or her contemporaneous observation of serious physical injury or death inflicted by the defendant's conduct on a member of the plaintiff's immediate family in his or her presence.

88. Damages ⚷57.14

Under the direct duty theory for proving negligent infliction of emotional distress under New York law, a plaintiff suffers emotional distress caused by defendant's breach of a duty which unreasonably endangered the plaintiff's own physical safety.

89. Negligence ⚷202

To establish a claim for negligence under New York law, a plaintiff must show that the defendant owed the plaintiff a cognizable duty of care, that the defendant breached that duty, and that the plaintiff suffered damages as a proximate cause of that breach.

90. Negligence ⚷210

The most basic element of a negligence claim under New York law is the existence of a duty owed to plaintiffs by defendants.

91. Banks and Banking ⚷100

Under New York negligence law, banks do not owe non-customers a duty to protect them from the intentional torts of their customers.

92. Damages ⚷57.18
Negligence ⚷210

Survivors of victims of September 11, 2001 attacks failed to state causes of action in complaint against alleged supporters of terrorists for negligence and negligent infliction of emotional distress, inasmuch as they failed to allege or identify duty owed to them by defendants.

93. War and National Emergency ⚷50

In light of extreme nature of charge of terrorism, fairness required extra-careful scrutiny of allegations by survivors of victims of September 11, 2001 attacks as to any particular defendant, to ensure that he, or it, had fair notice of claims, including claims under Antiterrorism Act (ATA). 18 U.S.C.A. § 2331 et seq.

94. Banks and Banking ⚷226

Allegations in complaint by survivors of victims of September 11, 2001 attacks, that Saudi Arabian bank aided and abetted terrorists by donating to charities and acting as bank for charities, failed to state cause of action under Antiterrorism Act (ATA) against bank, in that survivors offered no facts to support conclusion that bank knew of charities' alleged support for terrorism, and failed to allege relationship between Hamas, with which bank allegedly had ties, and September 11 terrorists. 18 U.S.C.A. § 2331 et seq.

95. Conspiracy ⚷1.1
Torts ⚷21

Under New York law, concerted action liability, pursuant to a conspiracy or aiding and abetting theory, requires general knowledge of the primary actor's conduct.

96. Banks and Banking ⚷226

Allegations in complaint by survivors of victims of September 11, 2001 attacks, that bank based in Rihadh, Saudi Arabia provided material support to al Qaeda, failed to state cause of action under Antiterrorism Act (ATA) against bank, absent allegations that bank knew that anything relating to terrorism was occurring through services it provided. 18 U.S.C.A. § 2331 et seq.

97. Banks and Banking ⚷226

Allegations in complaints by survivors of victims of September 11, 2001 attacks, that bank headquartered in Egypt provided financial services and other material support to terrorist organizations including al Qaeda, failed to state cause of action under Antiterrorism Act (ATA) against bank, in that complaints did not include facts to support inference that bank knew or had to know that it was providing material support to terrorists by providing financial services to charities or by processing wire transfers in Spain. 18 U.S.C.A. § 2331 et seq.

98. Brokers ⚷106

War and National Emergency ⚷50

Allegations in complaints by survivors of victims of September 11, 2001 attacks failed to state cause of action under Antiterrorism Act (ATA) against investment company based in Jeddah, Saudi Arabia or against Saudi Arabian bank founder, in that majority of allegations regarding investment company actually concerned another entity, survivors alleged that company supported charity but did not allege that company knew that charity was supporting terrorism, and allegation that employee of other entity's subsidiary financially supported two hijackers did not translate into allegation that bank founder provided material support to terrorism or aided and abetted those who provided material support. 18 U.S.C.A. § 2331 et seq.

99. Federal Civil Procedure ⚷1269.1

Limited jurisdictional discovery was warranted, on Saudi Arabian bank's motion to dismiss Antiterrorism Act (ATA) suit by survivors of victims of September 11, 2001 attacks, as to issue whether bank was immune from suit as instrumentality of Saudi Arabia, and as to whether District Court could exercise personal jurisdiction over bank. 18 U.S.C.A. § 2331 et seq.; Fed.Rules Civ.Proc.Rule 12(b)(2, 6), 28 U.S.C.A.

100. Federal Civil Procedure ⚷1269.1

Limited jurisdictional discovery was warranted, on Saudi Arabian construction company's motion to dismiss Antiterrorism Act (ATA) suit by survivors of victims of September 11, 2001 attacks, as to issue whether company purposefully directed its activities at United States, for purposes of personal jurisdiction. 18 U.S.C.A. § 2331 et seq.; Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

101. Federal Civil Procedure ⚷1269.1

Limited jurisdictional discovery was warranted, on charitable network's motion to dismiss Antiterrorism Act (ATA) suit by survivors of victims of September 11, 2001 attacks, as to which entities were subject to District Court's personal jurisdiction and whether entities transferred money to terror fronts. 18 U.S.C.A. § 2331 et seq.; Fed.Rules Civ.Proc.Rule 12(b)(2, 6), 28 U.S.C.A.

102. War and National Emergency ⚷50

Allegations of complaint filed by survivors of victims of September 11, 2001 attacks stated cause of action against bank chairman under Antiterrorism Act (ATA), in that allegations and his designation by Department of Treasury as Specially Designated Global Terrorist were sufficient to

permit inference that he provided support to al Qaeda. 18 U.S.C.A. § 2331 et seq.

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Michael J. Sommi, Cozen O'Connor, New York City, for Movants.

Opinion and Order

CASEY, District Judge.

On September 11, 2001, nineteen members of the al Qaeda terrorist network hijacked four United States passenger airplanes and flew them into the twin towers of the World Trade Center in New York City, the Pentagon in Arlington, Virginia, and—due to passengers' efforts to foil the hijackers—an open field in Shanksville, Pennsylvania. Thousands of people on the planes, in the buildings, and on the ground were killed in those attacks, countless others were injured, and billions of dollars of property was destroyed.

Pursuant to 28 U.S.C. § 1407, on December 9, 2003 the Multidistrict Litigation Panel centralized six then-pending September 11–related cases before this Court "for coordinated or consolidated pretrial proceedings." Additional actions, that are not the subject of this opinion, have since been filed. Plaintiffs in these consolidated actions are more than three thousand survivors, family members, and representatives of victims, and insurance carriers seeking to hold responsible for the attacks the persons and entities that supported and funded al Qaeda. The complaints al-

lege that over two hundred defendants directly or indirectly provided material support to Osama bin Laden and the al Qaeda terrorists. Generally, these defendants fall into one of several categories: al Qaeda and its members and associates; state sponsors of terrorism; and individuals and entities, including charities, banks, front organizations, terrorist organizations, and financiers who provided financial, logistical, and other support to al Qaeda.[1] *See, e.g., Ashton* Complaint ¶ 5; *Burnett* Complaint "Introduction"; *Federal* Complaint ¶¶ 42–66. The complaints assert subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.;* and causes of action under the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note; the Antiterrorism Act ("ATA"), 18 U.S.C. § 2331 *et seq.;* the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350; the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.;* theories of aiding and abetting, conspiracy, intentional infliction of emotional distress, negligence, survival, wrongful death, trespass, and assault and battery.

[1] Several motions to dismiss are pending before the Court. At the suggestion of counsel, the Court scheduled oral arguments in groups organized generally by grounds for dismissal. On September 14, 2004, the Court heard oral argument on the motions to dismiss for lack of subject matter jurisdiction under the FSIA by HRH Prince Sultan bin Abdulaziz Al–Saud ("Prince Sultan"), HRH Prince Turki Al–Faisal bin Abdulaziz Al–Saud ("Prince Turki"),[2] and the National Commercial

1. According to Plaintiffs, Osama bin Laden formed al Qaeda, which means "the Base" or "the Vanguard," into an international terrorist organization with the aim of violently opposing non-Islam governments and Islamic states too beholden to the West. *See, e.g., Burnett* Complaint at 275.

2. Before the Multidistrict Panel transferred *Burnett v. Al Baraka Inv. & Dev. Corp.,* 02 Civ. 1616, to this Court, Judge Robertson of the United States District Court for the District of Columbia dismissed the claims against Prince Sultan relating to acts performed in his official capacity for lack of subject matter jurisdiction. *Burnett v. Al Baraka Inv. & Dev. Corp.,* 292 F.Supp.2d 9, 23 (D.D.C.2003) (hereinafter *"Burnett II"*). Finding that the court lacked personal jurisdiction over Prince Sultan, Judge Robertson dismissed without prejudice the allegations concerning acts taken in his personal, as opposed to official, capacity. *Id.* Judge Robertson dismissed the complaint against Prince Turki for lack of subject matter jurisdiction as well. *Id.*

Prince Sultan and Prince Turki both move to dismiss the complaints against them in *Ashton v. Al Qaeda Islamic Army,* 02 Civ. 6977 (S.D.N.Y.); *Barrera v. Al Qaeda Islamic Army,* 03 Civ. 7036 (S.D.N.Y.); *Burnett v. Al Baraka Inv. & Dev. Corp.,* 02 Civ. 1616 (D.D.C.); *Burnett v. Al Baraka Inv. & Dev. Corp.,* 03 Civ. 5738 (S.D.N.Y.); *Salvo v. Al Qaeda Islamic Army,* 03 Civ. 5071 (S.D.N.Y.); and *Tremsky v. Osama bin Laden,* 02 Civ. 7300 (S.D.N.Y.). Plaintiffs in these cases filed consolidated responses to Prince Sultan's and Prince Turki's motions. In Plaintiffs' words, the New York *Burnett* action is materially identical to the D.C. *Burnett* action and was filed as a "prophylactic" measure in the event the D.C. court found that it lacked subject matter jurisdiction. *Burnett* Complaint at 265. Additionally, at Plaintiffs' counsel request, this Court ordered the *Barrera* action consolidated with the *Ashton* case on December 6, 2004.

Prince Sultan and Prince Turki have each also filed a separate motion to dismiss in *Federal Insurance v. Al Qaida,* 03 Civ. 6978 (S.D.N.Y.), both of which are fully submitted and are resolved in this opinion. The *Federal Insurance* Plaintiffs are forty-one insurance companies that have paid and reserved claims in excess of $4.5 billion as a result of the September 11 attacks.

The *Burnett* Plaintiffs filed a motion for reconsideration in conjunction with Prince Sultan's and Prince Turki's motions to dismiss certain consolidated complaints. While this Court reviews and gives deference to Judge Robertson's thoughtful opinion, it must evaluate Prince Sultan's and Prince Turki's

Bank ("NCB").[3] On October 12, 2004 the Court heard oral argument from Defendants who filed motions to dismiss for lack of personal jurisdiction, including Prince Sultan, HRH Prince Mohamed Al–Faisal Al–Saud ("Prince Mohamed"),[4] the estate of Mohammad Abdullah Aljomaih,[5] Sheikh Hamad Al–Husani,[6] NCB, Abdulrahman bin Mahfouz,[7] the Saudi Binladin Group, Tariq Binladin, Omar Binladin, and Bakr Binladin.[8] Although their counsel did not argue on that day, motions to dismiss by the African Muslim Agency, Grove Corporate, Inc., Heritage Education Trust, International Institute of Islamic Thought, Mar–Jac Investments, Inc., Mena Corporation, Reston Investments, Inc., Safa Trust, Sana–Bell Inc., Sterling Charitable Gift Fund, Sterling Management Group, Inc., and York Foundation, (hereinafter collectively referred to as the "SAAR Network"),[9] Prince Turki, and Adel A.J. Batterjee,[10] also raised personal jurisdiction defenses. On October 14, 2004 the Court heard oral argument from certain Defendants arguing Plaintiffs had failed to state a claim, including Al Rajhi Banking & Investment Corporation (hereinafter "Al Rajhi Bank"),[11] the Saudi American Bank,[12] Arab Bank,[13] NCB, the SAAR Network, Prince Mohamed, Al Baraka Investment & Development Corporation and Saleh Abdullah Kamel,[14] Abdulrahman bin Mahfouz, the Saudi Binladin Group, and Adel A.J. Batterjee. Finally, the last of this group of motions was entertained on

motions on the merits de novo. *See In re Grand Jury Proceedings (Kluger),* 827 F.2d 868, 871 n. 3 (2d Cir.1987) ("A transfer under 28 U.S.C. § 1407 'transfers the action lock, stock, and barrel. The transferee district court has the power and the obligation to modify or rescind any orders in effect in the transferred case which it concludes are incorrect.' ") (internal citations omitted). The Court bears in mind that it is bound by Second Circuit precedent while Judge Robertson applied D.C. Circuit law. *Menowitz v. Brown,* 991 F.2d 36, 40–41 (2d Cir.1993) (explaining transferee court is to apply its interpretation of federal law, not that of the transferor circuit); *In re Air Crash at Belle Harbor, New York,* No. 02 Civ. 8411(RWS), 2003 WL 124677, at *3 (S.D.N.Y. Jan. 15, 2003) (applying Second Circuit law after 28 U.S.C. § 1407 transfer from a district court in the Fifth Circuit).

3. NCB moves to dismiss the complaints against it in *Ashton* and *Burnett.*

4. Prince Mohamed moves to dismiss the complaints against him in *Ashton* and *Federal Insurance.*

5. The estate of Mohammad Abdullah Aljomaih moves to dismiss the complaint in *Burnett.*

6. Sheikh Hamad Al–Husani moves dismiss the complaint in *Burnett.*

7. Abdulrahman bin Mahfouz moves to dismiss the complaint in *Burnett.*

8. The Saudi Binladin Group moves to dismiss the complaints against it in *Burnett* and *Ashton.* Tariq Binladin, Omar Binladin, and Bakr Binladin move to dismiss the *Burnett* complaint.

9. The SAAR Network moves to dismiss the *Federal Insurance* complaint.

10. Adel A.J. Batterjee moves to dismiss the complaint in *Burnett.*

11. Al Rajhi Bank renews its motion to dismiss the *Burnett* complaint. Judge Robertson denied its original motion and permitted it to serve a Rule 12(e) request on the *Burnett* Plaintiffs. *Burnett v. Al Baraka Invest. & Dev. Corp.,* 274 F.Supp.2d 86, 110 (D.D.C.2003) (hereinafter *"Burnett I"*).

12. Saudi American Bank moves to dismiss the *Ashton* and *Burnett* complaints.

13. Arab Bank moves to dismiss the *Burnett* and *Federal Insurance* complaints.

14. Al Baraka Investment & Development Corporation and Saleh Abdullah Kamel move to dismiss the *Ashton* and *Burnett* complaints.

November 5, 2004, when the Court heard oral argument from the Kingdom of Saudi Arabia in its motion to dismiss the *Federal Insurance* complaint.[15]

I. Subject Matter Jurisdiction Under the FSIA

[2–4] Under the FSIA, a foreign state and its instrumentalities are presumed immune from United States courts' jurisdiction. *Saudi Arabia v. Nelson,* 507 U.S. 349, 355, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993); 28 U.S.C. §§ 1602–1607. The FSIA's exceptions to immunity provide the sole basis for obtaining subject matter jurisdiction over a foreign state and its instrumentalities in federal court. *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 439, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989); *Robinson v. Gov't of Malaysia,* 269 F.3d 133, 138 (2d Cir.2001). Federal courts must inquire at the "threshold of every action" against a foreign state whether the exercise of its jurisdiction is appropriate. *Verlinden B.V. v. Cent. Bank of Nigeria,* 461 U.S. 480, 493, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983).

A. Standard of Review

[5, 6] In a Rule 12(b)(1) motion to dismiss challenging subject matter jurisdiction under the FSIA, "the defendant must first 'present a prima facie case that it is a foreign sovereign.' " *Virtual Countries v. Republic of South Africa,* 300 F.3d 230, 241 (2d Cir.2002) (quoting *Cargill Int'l S.A. v. M/T Pavel Dybenko,* 991 F.2d 1012, 1016 (2d Cir.1993)). In response, the plaintiff must present evidence that one of the statute's exceptions nullifies the immunity. *Virtual Countries,* 300 F.3d at 241 ("Determining whether this burden is met involves a 'review of the allegations in the complaint, the undisputed facts, if any, placed before the court by the parties, and—if the plaintiff comes forward with sufficient evidence to carry its burden of production on this issue—resolution of disputed issues of fact.' ") (citing *Robinson,* 269 F.3d at 141); *Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah,* 184 F.Supp.2d 277, 287 (S.D.N.Y.2001) (explaining plaintiff may "rebut the presumption of immunity ... by proffering evidence of record that the defendant undertook certain activities that fall within the scope" of one of the statutory exceptions) (citing *Drexel Burnham Lambert Group Inc. v. Comm. of Receivers for A.W. Galadari,* 12 F.3d 317, 325 (2d Cir. 1993)). In challenging this Court's subject matter jurisdiction, the moving Defendants retain the ultimate burden of persuasion. *Virtual Countries,* 300 F.3d at 241 (citing *Cargill,* 991 F.2d at 1016); *Robinson,* 269 F.3d at 141 n. 8 (noting defendant's burden must be met with a preponderance of the evidence).

[7] Defendants may "challenge either the legal or factual sufficiency of the plaintiff's assertion of jurisdiction, or both." *Robinson,* 269 F.3d at 140 (citations omitted). "If the defendant challenges only the legal sufficiency of the plaintiff's jurisdictional allegations, the court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of the plaintiff." *Id.* (internal quotations and citations omitted); *Sweet v. Sheahan,* 235 F.3d 80, 83 (2d Cir.2000). "But where evidence relevant to the jurisdictional question is before the court, 'the district court ... may refer to that evidence.' " *Robinson,* 269 F.3d at 140 (quoting *Makarova v. United States,* 201 F.3d 110, 113 (2d Cir.2000)); *see also Filetech S.A. v. France Telecom S.A.,* 157 F.3d 922, 932

15. The parties have agreed that resolution of this motion will also apply to *Vigilant Insurance v. Kingdom of Saudi Arabia,* 03 Civ. 8591(RCC).

(2d Cir.1998) (explaining, where there are factual disputes regarding the immunity question, the court may not "accept the mere allegations of the complaint as a basis for finding subject matter jurisdiction"). Thus, "on a 'challenge to the district court's subject matter jurisdiction, the court may resolve disputed jurisdictional fact issues by reference to evidence outside the pleadings, such as affidavits.' " *Filetech,* 157 F.3d at 932 (explaining a court should consider all the submissions of the parties and may, if necessary, hold an evidentiary hearing to resolve the jurisdictional question) (quoting *Antares Aircraft, L.P. v. Federal Republic of Nigeria,* 948 F.2d 90, 96 (2d Cir.1991)). The court must consult outside evidence if resolution of a proffered factual issue may result in the dismissal of the complaint for lack of jurisdiction. *Robinson,* 269 F.3d at 141 n. 6. Defendants here challenge both the legal and factual sufficiency of Plaintiffs' claims. The Court will consider the affidavits submitted by the parties as necessary.

[8] Before turning to the allegations against the Defendants claiming immunity, the Court notes it is keenly aware of the "delicate balanc[e] 'between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign's or sovereign's agency's legitimate claim to immunity from discovery.' " *First City, Texas–Houston, N.A. v. Rafidain Bank,* 150 F.3d 172, 176 (2d Cir.1998) (ordering full discovery against defendant over whom court already had subject matter jurisdiction because such discovery would provide plaintiff an opportunity to obtain jurisdictional discovery regarding potentially sovereign alter ego co-defendant without further impinging that defendant's immunity) (quoting *Arriba Ltd. v. Petroleos Mexicanos,* 962 F.2d 528, 534 (5th Cir.1992) ("At the very least, discovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination.")). The Second Circuit has instructed "that generally a plaintiff may be allowed limited discovery with respect to the jurisdictional issue; but until [plaintiff] has shown a reasonable basis for assuming jurisdiction, she is not entitled to any other discovery." *First City,* 150 F.3d at 176–77 (quoting *Filus v. Lot Polish Airlines,* 907 F.2d 1328, 1332 (2d Cir. 1990)). Still, the Plaintiffs must allege sufficient facts to warrant jurisdictional discovery. *Robinson,* 269 F.3d at 146 (citing *Jazini v. Nissan Motor Co.,* 148 F.3d 181, 185 (2d Cir.1998) (refusing jurisdictional discovery where plaintiffs' allegations lacked factual specificity to confer jurisdiction)); *see also Burnett II,* 292 F.Supp.2d at 15 (denying Plaintiffs' request for discovery from Prince Turki where "suggestions of [his] individual activity are only conclusory").

B. Allegations Against Defendants Asserting Foreign Sovereign Immunity

1. Prince Sultan

Prince Sultan has been Saudi Arabia's Minister of Defense and Aviation and Inspector General of its Armed Forces since 1962. *Ashton* Complaint ¶ 265; *Burnett* Complaint ¶ 352; *Federal* Complaint ¶ 427; William H. Jeffress, Jr. Decl. ¶ 4 at Notice of HRH Prince Sultan Bin Abdulaziz Al–Saud's Motion to Dismiss Consolidated Complaint (hereinafter "Consolidated Jeffress Decl."); Andrea Bierstein Aff. in Opp. to Prince Sultan's Motion to Dismiss Consolidated Complaints Ex. 1, Sultan Bio, *available at http://saudiembassy.net/Country/Government/SultanBio.asp.* In 1982, his brother King Fahd bin Abdulaziz Al–Saud named him Second Deputy President of Saudi Arabia's Council of Ministers, the Kingdom's governing body. Nizar Bin

Obaid Nadani Decl. ¶ 2 at Notice of HRH Prince Sultan Bin Abdulaziz al-Saud's Motion to Dismiss Certain Consolidated Complaints Ex. 1 (hereinafter "Nadani Decl."); Consolidated Jeffress Decl. ¶ 4; *Federal* Complaint ¶ 427; Sultan Bio. As such, he is the third-highest ranking member of the Saudi government.

Especially relevant here, Prince Sultan is the Chairman of the Supreme Council of Islamic Affairs, which was established in 1995 and is responsible for the Kingdom's Islamic policy abroad. Consolidated Jeffress Decl. ¶ 5; *Ashton* Complaint ¶ 265; *Federal* Complaint ¶ 427. Prince Sultan disagrees with Plaintiffs' claim that the Supreme Council monitors and approves domestic and foreign charitable giving on behalf of the Kingdom. Prince Sultan prefers the characterization that the Supreme Council "carr[ies] out the foreign policy of Saudi Arabia as determined by the Council of Ministers." Abdulaziz H. Al-Fahad Decl. ¶ 5, at Sara E. Kropf Decl. Ex. 2. Finally, Prince Sultan, as the head of the Special Committee of the Council of Ministers, which is a foreign policy advisory resource for King Saud, exercises authority over disbursements by the Special Committee. Consolidated Jeffress Decl. ¶ 6. In the past, these disbursements, which are government funded, have included grants to Islamic charities. *Id.* at ¶ 6.

The various complaints make substantially similar accusations against Prince Sultan. *See* Consolidated Jeffress Decl. Ex. C (summarizing allegations against Prince Sultan in consolidated complaints). Prince Sultan is alleged to have met with Osama bin Laden after Iraq invaded Kuwait in the summer of 1990. *Ashton* Complaint ¶ 253; *Burnett* Complaint ¶ 340. At that meeting, which Prince Turki also attended, bin Laden purportedly offered his family's support to Saudi military forces. *Ashton* Complaint ¶ 253. Plaintiffs allege that, at the time of the Gulf War, Prince Sultan "took radical stands against western countries and publicly supported and funded several Islamic charities that were sponsoring Osama bin Laden and al Qaeda operations." *Ashton* Complaint ¶ 266; *Burnett* Complaint ¶ 353. After the attacks of September 11, Prince Sultan allegedly advocated against granting the United States use of Saudi military bases to stage attacks against Afghanistan. *Ashton* Complaint ¶ 273; *Burnett* Complaint ¶ 356.

Prince Sultan allegedly made personal contributions, totaling $6,000,000 since 1994, to various Islamic charities that Plaintiffs claim sponsor or support al Qaeda. *Ashton* Complaint ¶ 269; *Burnett* Complaint ¶ 359; *Federal* Complaint ¶ 430. The specific charities that Prince Sultan donated to include Defendants International Islamic Relief Organization ("IIRO"),[16] Al Haramain,[17] Muslim World League ("MWL"),[18] and the World Assembly of Muslim Youth ("WAMY").[19] *Ashton* Com-

16. IIRO is allegedly an al Qaeda front that has been tied to the 1993 World Trade Center attack and the 1998 embassy bombings. *See, e.g., Burnett* Complaint ¶¶ 156, 240, 242.

17. Beginning in 2002, certain branches of Al Haramain were designated by the United States as terrorist organizations. *See* Exec. Order No. 13224, 31 C.F.R. 595, *available at http://www.treas.gov/offices/enforcement/ofac/sanctions/t11ter.pdf* (hereinafter "Exec. Order No. 13224"). Judge Robertson denied Al Haramain's motion to dismiss the *Burnett* action. *Burnett I,* 274 F.Supp.2d at 107.

18. MWL is the parent of IIRO. *See, e.g., Burnett* Complaint ¶ 236.

19. WAMY is a suspected al Qaeda front, allegedly "preaching good . . . while plotting evil," connected to charity Defendant Benevolence International Foundation ("BIF"). BIF is now a designated terrorist, but it previously concealed its relationship with Osama bin

plaint ¶¶ 269–272; *Burnett* Complaint ¶¶ 354, 359; *Federal* Complaint ¶ 430. According to Plaintiffs, with respect to his alleged donations, "[a]t best, Prince Sultan was grossly negligent in the oversight and administration of charitable funds, knowing they would be used to sponsor international terrorism, but turning a blind eye. At worse, Prince Sultan directly aided and abetted and materially sponsored al Qaeda and international terrorism." *Burnett* Complaint ¶ 363; *Federal* Complaint ¶¶ 429–31 (alleging Prince Sultan knew and intended that the contributions he made to various charities would be used to fund al Qaeda and international terrorism).[20]

2. Prince Turki

Prince Turki is currently the Kingdom of Saudi Arabia's ambassador to the United Kingdom. *Ashton* Complaint ¶ 263. From 1977 until August 2001, he was the Director of Saudi Arabia's Department of General Intelligence ("DGI," also known by its Arabic name, Istakhbarat). *Ashton* Complaint ¶ 255; *Burnett* Complaint ¶ 343; *Federal* Complaint ¶ 445. As such, Plaintiffs allege he was or should have been aware of the terrorist threat posed by Osama bin Laden, al Qaeda, and the Taliban. *Ashton* Complaint ¶ 256; *Burnett* Complaint ¶ 343. Prince Turki allegedly met with Osama bin Laden five times in the mid–1980s and mid–1990s. *Ashton* Complaint ¶ 257; *Burnett* Complaint ¶ 344. At one of those meetings, which Prince Sultan also attended, bin Laden allegedly offered the Saudis the use of his family's engineering equipment and suggested bolstering Saudi military forces with militants. *Ashton* Complaint ¶ 253. Prince Turki is alleged to have close ties with an al Qaeda financier, Mr. Zouaydi, and is allegedly implicated in Mr. Zouaydi's financial support of al Qaeda. *Ashton* Complaint ¶ 241; *Burnett* Complaint ¶ 345. Further, Plaintiffs claim Prince Turki met with members of the Taliban and, in 1995, gave the Taliban financial and material support. *Ashton* Complaint ¶ 257; *Federal* Complaint ¶¶ 447–48 (alleging that, at the time Prince Turki provided support, the Taliban maintained a symbiotic relationship with al Qaeda and thus Prince Turki knew al Qaeda would benefit from the Kingdom's support). In July 1998, Prince Turki is alleged to have met with members of the Taliban and representatives of bin Laden and agreed to not extradite bin Laden or close terrorist camps in exchange for bin Laden's protection of the

Laden and al Qaeda. *See, e.g., Burnett* Complaint ¶¶ 160, 205, 229, 362; Exec. Order 13224.

20. Prince Sultan denies making any grants to Al Haramain and MWL and argues that contributions made to IIRO and WAMY were made strictly in his official capacity on behalf of the Saudi government. Further, he claims the four charities searched their records and confirmed that Prince Sultan did not make any personal contributions. These transmittal letters and government checks were included in Prince Sultan's motion to dismiss the D.C. *Burnett* action. Judge Robertson found these documents had "limited probative value, [as they] lack[ed] proper foundations to establish that the affiants could have known the actual source of the moneys they received." *Burnett II,* 292 F.Supp.2d at 16. This Court has reviewed these affidavits and agrees with Judge Robertson's assessment. For example, one declarant who provided information regarding alleged contributions relied on his personal knowledge of a charity's records, yet he had only been in his position for two months. *See* Decl. of Saleh Abdullah Al Saykhan ¶ 2, at Decl. of Sara E. Kropf in Support of Prince Sultan's Motion to Dismiss the D.C. *Burnett* action. As Judge Robertson pointed out, "the value of plaintiffs' showing that Prince Sultan did give money to these organizations in his personal capacity, however, is no greater." *Burnett II,* 292 F.Supp.2d at 16 (referring to Saudi press reports of Prince Sultan's contributions).

Saudi Royal family. *Ashton* Complaint ¶ 261; *Burnett* Complaint ¶ 348. Plaintiffs allege Prince Turki facilitated money transfers from wealthy Saudis to the Taliban and al Qaeda. *Ashton* Complaint ¶ 259; *Federal* ¶ 451. Additionally, the *Federal* Plaintiffs claim that, while Prince Turki was the head of DGI, Saudi Arabian intelligence officers allegedly trained a member of the al Qaeda Spanish cell in explosives and provided material support to two of the September 11 hijackers. *Federal* Complaint ¶ 449. The *Federal* complaint also alleges that Prince Turki made personal contributions to Saudi-based charities that he knew were sponsors of al Qaeda, including IIRO, MWL, WAMY, BIF, the Saudi High Commission, Saudi Joint Relief Committee for Kosovo and Chechnya ("SJRC"), and Al Haramain. *Federal* Complaint ¶¶ 451–52.

[9] Prince Turki denies the allegations against him in a declaration prepared in concert with his motion to dismiss the D.C. *Burnett* action. In reviewing this declaration, the Court gives "great weight to any extrinsic submissions made by the foreign defendant[ ] regarding the scope of [his] official responsibilities." *Leutwyler,* 184 F.Supp.2d at 287 (internal quotation marks omitted). Prince Turki explains that the DGI "is involved in the collection and analysis of foreign intelligence and in carrying out foreign operations." Decl. of HRH Prince Turki ¶ 5, at HRH Prince Turki's Motion to Dismiss Certain Consolidated Complaints Ex. 1 (hereinafter "Prince Turki Decl."). He was active in Saudi Arabia's efforts to combat terrorism generally and the threat posed by Osama bin Laden and al Qaeda specifically, and served on a joint information-sharing committee with the United States beginning in 1997. *Id.* ¶¶ 6, 10. He states that all of his interactions with Osama bin Laden and the Taliban were part of his official functions. *Id.* ¶ 5. In June 1998, King Fahd sent Prince Turki to Kandahar to meet with the Taliban and to relay the official Saudi request that Osama bin Laden be extradited to Saudi Arabia for trial. *Id.* ¶ 11. The Taliban denied the Saudi request and Saudi Arabia subsequently suspended diplomatic relations with the Taliban in September 1998. *Id.* ¶ 13. Prince Turki denies facilitating money transfers to Osama bin Laden or al Qaeda, he denies offering material assistance to Osama bin Laden, his representatives, or al Qaeda in return for their not attacking Saudi Arabia, he denies promising or providing oil or financial assistance to the Taliban, and denies ever hearing of the Syrian financier Mr. Zouaydi, with whom he is alleged to have ties. *Id.* ¶¶ 14, 16, 17.

3. Kingdom of Saudi Arabia

The *Federal* Plaintiffs claim that "[m]ore than any other factor, al Qaida's phenomenal growth and development into a sophisticated global terrorist network were made possible by the massive financial, logistical and other support it received from the Kingdom of Saudi Arabia, members of the Saudi Royal family, and prominent members of Saudi society." *Federal* Complaint ¶ 398. Further, the *Federal* Plaintiffs allege September 11 was "a direct, intended and foreseeable product of the Kingdom of Saudi Arabia's participation in al Qaida's jihadist campaign." *Id.* ¶ 425. Specifically, the Kingdom allegedly maintained and controlled several of the charities within al Qaeda's infrastructure. *Id.* ¶ 399. The *Federal* Plaintiffs claim Saudi Arabia knew the threat that these charities posed particularly to the United States, and did nothing to stop it. *Id.* ¶¶ 400–02. The Kingdom allegedly used its relationship with the Taliban to sustain al Qaeda in the mid–1990s. *Id.* ¶¶ 403, 407. To the extent the *Federal* Plaintiffs rely on actions by members of the Saudi Royal family as allegations against the Kingdom, they

make no claim that these individuals were acting on behalf of or at the behest of the Kingdom. *See, e.g., id.* ¶ 420 (claiming that in January 1999 Princess Haifa made payments to Al–Bayoumi, a Defendant alleged to have paid rent on behalf of two of the hijackers). Finally, Plaintiffs allege that members of the Saudi Royal family provided support to al Qaeda in their official capacities as members of the Supreme Council of Islamic Affairs. *Federal* Complaint ¶¶ 426–464.

4. National Commercial Bank

NCB was established in 1950 by Salim bin Mahfouz, the father of Defendant Khalid bin Mahfouz, as the first commercial bank of Saudi Arabia. *Ashton* Complaint ¶ 563; *Burnett* Complaint ¶ 88. The *Ashton* Plaintiffs allege that the bin Mahfouz family controlled NCB until 1999 when the Saudi government bought a majority of its shares. *Ashton* Complaint ¶ 573.[21] The *Ashton* and *Burnett* Plaintiffs claim that NCB has a wholly-owned subsidiary in New York, SNCB Securities, Ltd., through which it operates an international banking business. *Ashton* Complaint ¶ 563; *Burnett* Complaint ¶ 88.

Plaintiffs claim Osama bin Laden and al Qaeda used NCB as "a financial arm, operating as a financial conduit for [their] operations." *Ashton* Complaint ¶ 564; *Burnett* Complaint ¶ 89. In 1986, Khalid bin Mahfouz became NCB's President and CEO and remained so until 1999. *Ashton* Complaint ¶ 563; *Burnett* Complaint ¶ 88. Also in 1986, Khalid bin Mahfouz became the Chief Operating Officer and a major shareholder of the Bank of Credit and Commerce International ("BCCI"). *Ashton* Complaint ¶¶ 564, 566; *Burnett* Complaint ¶¶ 89, 91. He was subsequently indicted in New York state in connection with his involvement in BCCI's fraudulent practices, which also implicated NCB. *Ashton* Complaint ¶¶ 564, 566; *Burnett* Complaint ¶¶ 89, 91.

Plaintiffs claim both NCB and BCCI supported international terrorism. *Ashton* Complaint ¶¶ 564–68; *Burnett* Complaint ¶¶ 91–93. Specifically, a "1999 United States Senate Report on the BCCI scheme detailed the role of [NCB] in hiding assets, money laundering, the cover-up and obstruction of a Senate investigation, and sponsoring international terrorism." *Burnett* Complaint ¶ 89. Additionally, a 1998 NCB bank audit revealed irregularities involving direct donations to several charities and that $74 million had been funneled by the bank's Zakat Committee to IIRO.[22] *Ashton* Complaint ¶¶ 569–71; *Burnett* ¶¶ 94, 95. NCB also allegedly made loans to charitable organizations without the knowledge of the Zakat Committee. *Id.* Plaintiffs allege "direct donations were received through NCB facilities to the Red Crescent Committee, [IIRO], and the Muwaffaq Foundation," all Defendants in these actions. *Ashton* Complaint ¶ 570; *Burnett* Complaint ¶ 95. Muwaffaq allegedly provided Osama bin Laden with $3 million in 1998. *Ashton* Complaint ¶ 573. Plaintiffs claim NCB knew or should have known it was materially supporting al Qaeda, Osama bin Laden, and international terrorism. *Ashton* Complaint ¶ 570; *Burnett* Complaint ¶ 95.

C. Defendants' Status as Foreign States for FSIA Purposes

The Court must first determine if the moving Defendants are "foreign states" for

21. The Ashton Plaintiffs moved to amend this allegation to claim that the Public Investment Fund ("PIF"), not the Saudi government, purchased a majority of NCB shares in 1999. *Ashton* Docket ## 137, 138.

22. Zakat is required almsgiving by all Muslims. *See, e.g., Burnett* Complaint at 275; *id.* ¶ 40.

purposes of the FSIA. A "foreign state" is statutorily defined:

> (a) A "foreign state" . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity -
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

28 U.S.C. § 1603. There is no dispute that the Kingdom of Saudi Arabia is a foreign state. The status of each of the Princes and NCB are discussed below.

1. Prince Sultan and Prince Turki

Several courts have recognized that "[i]mmunity under the FSIA extends also to agents of a foreign state acting in their official capacities [since] '[i]t is generally recognized that a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly.' "[23] *Bryks v. Canadian Broad. Corp.*, 906 F.Supp. 204, 210 (S.D.N.Y.1995) (quoting *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir.1990) ("Nowhere in the text or legislative history does Congress state that individuals are not encompassed within 28 U.S.C. § 1603(b).")); *see also Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398–99 (4th Cir.2004) (collecting cases extending FSIA immunity to individuals sued in their official capacities); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir.1999) (acknowledging the FSIA protects individuals to the extent they act within their official duties); *El–Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C.Cir.1996) (dismissing claims against government officials since they were sued in their official capacities); *Leutwyler*, 184 F.Supp.2d at 286–87 ("[I]t has been generally recognized that individuals employed by a foreign state's agencies or instrumentalities are deemed 'foreign states' when they are sued for actions undertaken within the scope of their official capacities.") (citing *Bryks*, 906 F.Supp. at 210); *Flatow v. Islamic Republic of Iran*, 999 F.Supp. 1, 11 n. 3 (D.D.C.1998) (noting favorable practice of applying FSIA to individuals). Thus, this Court finds that immunity may be available to Prince Sultan, as the third-highest ranking member of the Saudi government, and to Prince Turki, as the Director of Saudi Arabia's Department of General Intelligence, to the extent their alleged actions were performed in their official capacities.

[10] The *Federal* Plaintiffs argue that the FSIA cannot apply to Prince Turki because, as of September 10, 2003 when the complaint was filed, Prince Turki was the Saudi ambassador to the United Kingdom, a position the *Federal* Plaintiffs allege is not entitled to immunity under the FSIA. In support of this argument, the *Federal* Plaintiffs cite *Dole Food Co. v. Patrickson*, 538 U.S. 468, 480, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003), in which the Supreme Court held that instrumentality status is determined at the time of the filing of the complaint.

23. The FSIA is silent on the subject. Neither the Supreme Court nor the Second Circuit has specifically addressed the issue.

[11] The Court disagrees with this reliance on *Dole Food.* The Supreme Court resolved two questions in *Dole Food.* "The first [was] whether a corporate subsidiary can claim instrumentality status where the foreign state does not own a majority of its shares but does own a majority of the shares of a corporate parent one or more tiers above the subsidiary. The second question [was] whether a corporation's instrumentality status is defined as of the time an alleged tort or other actionable wrong occurred or, on the other hand, at the time the suit is filed." *Id.* at 471, 123 S.Ct. 1655. The Supreme Court held that a foreign state's ownership of an entity must be direct for the entity to be considered an instrumentality. *Id.* at 474, 123 S.Ct. 1655. The Supreme Court also ruled that ownership must be determined as of the date on which the complaint was filed. *Id.* at 480, 123 S.Ct. 1655. Neither of these points of law speaks, however, to the circumstances under which an individual is covered by the FSIA. Indeed, numerous other courts that have addressed this issue have held that the relevant inquiry for individuals is simply whether the acts in question were undertaken at a time when the individual was acting in an official capacity. *See, e.g., Velasco,* 370 F.3d at 398–99; *Byrd,* 182 F.3d at 388; *Bryks,* 906 F.Supp. at 210. This Court considers that precedent to be more consistent with the FSIA and unaltered by the decision in *Dole Food.* Thus, it deems Prince Turki the equivalent of the foreign state inasmuch as the complaints allege actions taken in his official capacity as the head of the DGI. Accordingly, both Prince Sultan and Prince Turki are immune from suit for their official acts unless an exception under the FSIA applies.

2. National Commercial Bank

NCB submits that it is an instrumentality of the Kingdom of Saudi Arabia and therefore immune from suit. *See* Decl. of Nizar Bin Obaid Madani, Assistant Minister of Foreign Affairs of Kingdom of Saudi Arabia ¶ 2, at Berger Decl. Ex. 7 ("It is the position of the Ministry of Foreign Affairs that NCB is a government instrumentality of the Kingdom of Saudi Arabia."). To enjoy immunity from suit under the FSIA, NCB must demonstrate that it is an agency or instrumentality, or a political subdivision of the Kingdom. 28 U.S.C. § 1603(a). As explained above, the FSIA defines an "agency or instrumentality" as (1) "a separate legal person, . . .(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof," and (3) a non-U.S. citizen. 28 U.S.C. § 1603(b). Accordingly, NCB claims that (1) it is a separate legal person, (2) at the time the suit was filed a majority of its shares were owned by an administrative unit of the Saudi Ministry of Finance, the Public Investment Fund ("PIF"),[24] and (3) it is not a citizen of the United States

24. After the parties submitted their briefs and argued the FSIA issue, the *Ashton* Plaintiffs filed supplemental affidavits, without leave of the Court, to contest, for the first time, the timing of the PIF's majority ownership. *See* 03 MD 1570 Docket # 455. The parties agree that the PIF bought 50% of NCB shares in May 1999. *See* John Fawcett Sept. 23, 2004 Supplemental Affidavit at Ex. 1 ("Fawcett Supp. Aff."). Later in 1999, the PIF sold 10% of its shares to the General Organization for Social Insurance. Fawcett Supp. Aff. at Ex. 2. Late in 2002 the PIF agreed to buy 30% of the remaining shares from the bin Mahfouz family, but Plaintiffs claim the purchase was not completed until January 2003, after the lawsuit was filed on September 4, 2002. *See* Fawcett Supp. Aff. at Ex. 3 & 4 (news accounts of sale). For the reasons that will be explained below, the Court finds it unnecessary to resolve this dispute at this time.

or created under the laws of a third country.

[12] In *Dole Food*, the Supreme Court held "that only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement" outlined in § 1603(b). 538 U.S. at 474, 123 S.Ct. 1655. Accordingly, the Kingdom of Saudi Arabia's ownership of NCB must be direct for NCB to enjoy immunity under the FSIA. That is, NCB will not be deemed an instrumentality of the Kingdom if the PIF, its majority owner, is determined to be an agency, instrumentality, or organ of the Kingdom. *See* § 1603(b)(2) (stating agency or instrumentality is entity whose majority ownership interest is held by either the foreign state or a political subdivision thereof); *Filler v. Hanvit Bank*, 378 F.3d 213 (2d Cir.2004) (holding an organ's ownership of two banks did not, in turn, make the banks organs or instrumentalities of foreign state); *see also In re Ski Train Fire in Kaprun, Austria*, 198 F.Supp.2d 420, 426 (S.D.N.Y.2002) (holding ski resort owner, which was owned in part by instrumentality of Austrian government, was not instrumentality because it was not owned directly by the state or a subdivision thereof); *Hyatt Corp. v. Stanton*, 945 F.Supp. 675, 688 (S.D.N.Y.1996) (concluding "that corporations a majority of whose shares are owned by agencies or instrumentalities of foreign states are not themselves agencies or instrumentalities"). Thus, NCB must demonstrate that the PIF is the equivalent of the Kingdom of Saudi Arabia or a political subdivision thereof.

The PIF was established by Royal Decree with the sole function of "financing ... investments in productive projects of a commercial nature whether they belong to the Government or the industrial lending institutions connected to it or to its public corporations and whether these projects are undertaken independently or in partnership between these administrative parties and private institutions." PIF Charter ¶ 2, at Berger Aff. Ex. 4B ("PIF Charter"); Affidavit of Abdallah Bin Hamad Al–Wohaibi ¶ 3, the Director of the Legal Department of the Ministry of Finance, at Berger Aff. Ex. 4 ("Al–Wohaibi Aff."). Its board of directors are all Saudi officials named in its charter, its employees are civil servants, and the Ministry of Finance is responsible for its costs. *Id.* ¶¶ 4, 8, 10; *see also* PIF Charter ¶¶ 4, 7. Its board must submit an annual report to Saudi Arabia's Council of Ministers summarizing its financial position and major operations. Al–Wohaibi Aff. ¶ 10. It has no separate legal status from the Ministry of Finance. *Id.* ¶ 4. The PIF holds shares of corporations and operational assets, "generally ... on behalf of the Ministry of Finance." *Id.* ¶ 9. It may be sued as a department of the Ministry of Finance, and as such, the Ministry of Finance would be named as the defendant. *Id.* ¶ 12. It funds investments on behalf of the Kingdom and it provides financing terms for projects that commercial lenders do not. *Id.* ¶ 5; Supplemental Al–Wohaibi Aff. ¶¶ 8–10 (hereinafter "Supp. Al–Wohaibi Aff.").

a. Status of the PIF

In *Filler v. Hanvit Bank*, a case with facts very similar to those presented here, the Second Circuit reiterated *Dole Food's* requirement of direct ownership for instrumentality status. Two defendants were commercial banks majority-owned by the Korean Deposit Insurance Corporation ("KDIC"), a "governmental institution" run by the Korean Ministry of Finance and the Economy of the Republic of Korea. *Filler*, 378 F.3d at 215–16. In determining if KDIC was an organ of Korea, the court considered several factors:

> (1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law.

Id. at 217 (citing *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846–47 (5th Cir.2000) (alteration in original)). The Second Circuit held that the KDIC was an organ of Korea because it was formed by statute and presidential decree; it performs the governmental functions of protecting depositors and promoting financial stability; its directors are appointed by the Ministry of Finance and Economy; its president is appointed by the President of the Republic of Korea; and many of its operations are overseen by the Ministry of Finance and Economy. *Id.*

The banks argued that once the court determined KDIC was an organ of the foreign state, the banks automatically became instrumentalities or agencies of the state because KDIC owned a majority of their stock. *Id.* The Second Circuit rejected this argument, finding such a holding would "permit an infinite number of subsidiaries to enjoy sovereign immunity, ... would be incompatible with the purpose of the FSIA, which is to grant governmental, not private corporate immunity, and ... would reflect infidelity to the Supreme Court's reasoning in *Dole Food.*" *Id.* at 218. Accordingly, it reiterated that "'a subsidiary of an instrumentality is not itself entitled to instrumentality status' ... and that 'only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement.'" *Id.* (quoting *Dole Food*, 538 U.S. at 473–74, 123 S.Ct. 1655).

The Second Circuit determined the KDIC was an organ of Korea by considering whether it was created and supervised by a foreign state and whether public employees were performing public functions. *Id.* at 217. Under its reasoning, it would appear the PIF is also an organ. It was created by royal decree, it is supervised by the Kingdom's Council of Ministers and staffed with government employees. *See* PIF Charter.

Yet, under the "legal characteristics" test, the PIF could qualify as a political subdivision. *See Hyatt*, 945 F.Supp. at 680. In *Hyatt*, a court in this district reasoned that a statutory requirement of an agency or instrumentality, as opposed to a political subdivision, is that it is a "separate legal person ... that can function independent of the state." *Id.* at 684. If an entity could sue and be sued, own property, and contract in its own name, it would be considered an agency or instrumentality and not a political subdivision. *Id.* at 685. NCB submits the PIF sues and is sued as, and generally holds property on behalf of, the Ministry of Finance. Al–Wohaibi Aff. ¶¶ 9, 12.

NCB argues the Court should employ the "core functions" test outlined in *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148 (D.C.Cir.1994), to find that the PIF is the equivalent of the Kingdom. Under this test, if the entity's core functions are governmental, it is considered the state itself. *Id.* at 153. If its functions are commercial in nature, it is considered an instrumentality. *Id.* This Court is governed by Second Circuit precedent and finds *Filler* and *Hyatt* to be controlling. Even if it were to adopt *Transaero*, however, the Court finds on the record before it that the PIF's emphasis on commercial projects precludes a finding that its core functions are governmental in nature. *See* PIF Charter ¶ 2 (noting the PIF's primary

function of "financing ... investments in productive projects of a commercial nature").

NCB also urges that *O'Connell Machinery Co. v. M.V. "Americana,"* 734 F.2d 115 (2d Cir.1984), mandates the finding that the PIF is a political subdivision of the Kingdom. In *O'Connell*, the Second Circuit reasoned that the legislative history of the FSIA indicated that "political subdivisions" were intended to include "all governmental units beneath the central government." *Id.* (quoting H.R.Rep. No. 1487, 94th Cong., 2d Sess. 15, *reprinted in*, 1976 U.S.C.C.A.N. 6604, 6613). Given the PIF's position under the Ministry of Finance, *O'Connell* could lead to the conclusion that the PIF is a political subdivision of the Kingdom of Saudi Arabia. *Id.; but see In re Ski Train Fire*, 198 F.Supp.2d at 425 n. 9 (distinguishing *O'Connell* on grounds that the court based its holding on a finding that the Italian government double-tiered its administrative agencies); *Hyatt*, 945 F.Supp. at 683–84 (finding definition of "political subdivision" in *O'Connell* too broad and suggesting the case should be limited to its facts and not applied widely). In the twenty years since *O'Connell* was decided, however, courts have been inclined to limit the FSIA's grant of immunity. *See, e.g., Dole Food*, 538 U.S. at 473–74, 123 S.Ct. 1655; *Filler*, 378 F.3d at 218. Accordingly, the Court will not rely on *O'Connell* here.

b. Limited Jurisdictional Discovery is Warranted

[13] The Court finds that resolution of the PIF's and thereby NCB's status is not determinable on the current record and, therefore, limited jurisdictional discovery is warranted. As explained above, the PIF could qualify either as an organ or political subdivision of the Kingdom of Saudi Arabia. Additionally, the affidavits on which the parties ask the Court to rely have not been subjected to cross examination and are rather self-serving. The parties should have the opportunity to take discovery of the jurisdictionally relevant facts. *First City*, 150 F.3d at 177; *see also In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 208 (2d Cir.2003) (instructing district court to permit discovery before granting motion to dismiss based on fact-sensitive, multi-factor test). Accordingly, NCB's motion to dismiss for lack of subject matter jurisdiction based on the FSIA is denied without prejudice. Limited jurisdictional discovery will be permitted to explore PIF's function, organizational structure, and place within the Kingdom of Saudi Arabia.

D. Application of FSIA Exceptions to the Princes and Kingdom of Saudi Arabia

Three exceptions to foreign sovereign immunity are implicated in these motions—the commercial activities exception, 28 U.S.C. § 1605(a)(2), the state sponsor of terrorism exception, 28 U.S.C. § 1605(a)(7), and the torts exception, 28 U.S.C. § 1605(a)(5).

1. Commercial Activities Exception

[14] Section 1605(a)(2) states:

> A foreign state shall not be immune ... in any case ... in which the action is based ... upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). The statute defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act.

The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). The Supreme Court has explained, "when a foreign government acts, not as a regulator of the market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." *Weltover*, 504 U.S. at 614, 112 S.Ct. 2160. Courts must inquire whether the foreign state's actions "are the type of actions by which a private party engages in trade and traffic or commerce." *Id.* (internal citations omitted).

[15] Judge Robertson determined that the commercial activity exception did not apply to the *Burnett* Plaintiffs' claims against Prince Sultan and Prince Turki because "the act of contributing to a foundation is not within our ordinary understanding of 'trade and traffic or commerce' nor, apparently was it within the contemplation of ... Congress." *Burnett II*, 292 F.Supp.2d at 18 (citing H.R.Rep. No. 94–1487, at 16, *reprinted in* 1976 U.S.C.C.A.N. at 6615). Thus, the consolidated Plaintiffs do not assert that the commercial activities exception is applicable to any of the Defendants raising FSIA defenses here. This Court adopts Judge Robertson's reasoning. To the extent any Plaintiffs' claims are based on a Defendant's contributions to charities, those acts cannot be considered commercial.

[16, 17] The *Federal* Plaintiffs allege that the Kingdom of Saudi Arabia, Prince Sultan, and Prince Turki financed terrorism by contributing to or supporting charities known to support terrorist activities. In these Plaintiffs' view, this is essentially money laundering and, therefore, a commercial activity. *See, e.g.*, Federal Plaintiffs' Opp. to Motion to Dismiss of Prince Sultan at 18 (citing *U.S. v. Goodwin*, 141 F.3d 394, 399 (2d Cir.1997)). The Second Circuit noted in *Goodwin* that "[m]oney laundering is a quintessential economic activity," 141 F.3d at 399, but that statement has no bearing here. In *Goodwin* the court was not deciding whether money laundering is a commercial activity for purposes of the FSIA. *Id.* (analyzing constitutionality of criminal money laundering statute). The Second Circuit has made very clear that, for purposes of the FSIA, a commercial activity must be one in which a private person can engage lawfully. *Letelier v. Republic of Chile*, 748 F.2d 790, 797–98 (2d Cir.1984); *see also Saudi Arabia v. Nelson*, 507 U.S. 349, 360–62, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993) (holding detaining and torturing plaintiff is not commercial activity since it "is not the sort of action by which private parties can engage in commerce"). Since money laundering is an illegal activity, *see* 18 U.S.C. § 1956 (criminalizing money laundering), it cannot be the basis for applicability of the commercial activities exception. *See Letelier*, 748 F.2d at 798 (holding alleged participation in an assassination is not a lawful activity and therefore not a commercial activity for purposes of the FSIA). Accordingly, the Court finds that the commercial activities exception outlined in § 1605(a)(2) is inapplicable to the allegations contained in the *Federal* complaint against the Kingdom of Saudi Arabia, Prince Sultan, and Prince Turki.

2. State Sponsor of Terrorism

[18] Subsection (a)(7) lifts immunity in cases:

> in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources ... for such an act ... *except* that the

> court shall decline to hear a claim under this paragraph
>
> (A) if the foreign state was not designated as a state sponsor of terrorism . . . .

28 U.S.C. § 1605(a)(7) (emphasis added). The parties agree that the Kingdom of Saudi Arabia has not been designated a state sponsor of terrorism. *See* 28 U.S.C. § 1605(a)(7)(A) (explaining there is no jurisdiction if "the foreign state was not designated as a state sponsor of terrorism under . . . the Export Administration Act of 1979 . . . or . . . the Foreign Assistance Act of 1961"). Thus, this exception does not provide an exception to immunity for any of the Defendants raising the FSIA defense here.

3. Torts Exception

In relevant part, the torts exception deprives a foreign sovereign of immunity in actions:

> in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this [exception] shall not apply to -
>
> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused.

28 U.S.C. § 1605(a)(5). Second Circuit law instructs that district courts must determine whether the defendant's alleged acts were tortious under the laws of New York and, if so, whether the defendant's acts were discretionary. *Robinson,* 269 F.3d at 142 ("If those activities could not render the Malaysian government liable for a tort under New York law, then it remained immune under § 1605(a)(5)."). In the event that the act is tortious and the acts were not discretionary, the alleged tortfeasor is subject to suit under the FSIA.

[19] The FSIA's discretionary function exception replicates the discretionary function exception found in the Federal Tort Claims Act. *See* 28 U.S.C. § 2680(a). Courts have found both exceptions are "intended to preserve immunity for 'decisions grounded in social, economic, and political policy.'" *Marchisella v. Gov't of Japan,* No. 02 Civ. 10023(DC), 2004 WL 307248, at *2 (S.D.N.Y. Feb. 17, 2004) (citing *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines),* 467 U.S. 797, 814, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984) (interpreting FTCA)). Generally, acts are discretionary if they are performed at the planning level of government, as opposed to the operational level. *Kline v. Kaneko,* 685 F.Supp. 386, 392 (S.D.N.Y.1988) (finding decision to expel plaintiff from Mexico was product of enforcement of immigration laws and therefore a discretionary function); *Marchisella,* 2004 WL 307248, at *2 (finding decision regarding placement of a water hose on a ship was an operational function and therefore not discretionary and not protected by the FSIA); *Napolitano v. Tishman Constr. Corp.,* No. 96 Civ. 4402(SJ), 1998 WL 102789, at *4 (E.D.N.Y. Feb. 26, 1998) (finding purchasing consulate buildings and hiring contractor to renovate is a planning function and therefore discretionary).

Defendants argue that the Court should not even consider the torts exception for two reasons. First, they claim that for this exception to apply, the entire tort must have occurred in the United States, which Defendants argue is not the case here. Second, Defendants claim that Plaintiffs impermissibly seek to contort a

§ 1605(a)(7) state sponsor of terrorism claim into a § 1605(a)(5) tort claim.

With respect to Prince Sultan's and Prince Turki's arguments that the entire tort, meaning both the tortious conduct and the injury, must occur in the United States, Judge Robertson disagreed and stated the FSIA "preserves immunity for tort claims unless injury *or* death occurs in the United States." *Burnett II,* 292 F.Supp.2d at 19 n. 4 (quoting *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, 775 (D.C.Cir.1984)) (Edwards, J., concurring) (some emphasis omitted). Courts in the Second Circuit seem to take the opposite approach. "Although cast in terms that may be read to require that only the injury rather than the tortious acts occur in the United States, the Supreme Court has held that this exception 'covers only torts occurring within the territorial jurisdiction of the United States.' " *Cabiri v. Gov't of the Republic of Ghana,* 165 F.3d 193, 200 n. 3 (2d Cir.1999) (quoting *Amerada Hess,* 488 U.S. at 441, 109 S.Ct. 683); *see also Hirsh v. State of Israel,* 962 F.Supp. 377, 383–84 (S.D.N.Y.1997) (citing legislative history stating both the tort and injury must occur within the United States for the exception to apply and dismissing complaint where plaintiffs failed to allege specific tort or place tort occurred); *Kline,* 685 F.Supp. at 391 (finding tort exception inapplicable where victim was abducted in Mexico City and brought to the United States because "the entire tort must be committed in the United States").

Plaintiffs allege that the Kingdom, Prince Sultan, and Prince Turki tortiously aided and abetted the September 11 terrorists by supporting charities that, in turn, supported al Qaeda and international terrorism. Plaintiffs also claim that, in return for protection of the Kingdom, these Defendants essentially willfully ignored the threat that Osama bin Laden and al Qaeda posed to the United States. Plaintiffs do not claim that the Kingdom or the Princes undertook any of their alleged acts in the United States. Yet, in the Plaintiffs' view, the operative torts for the Court's consideration are the attacks of September 11, which did take place in the United States. *See Burnett II,* 292 F.Supp.2d at 19 n. 4 (noting death and injuries occurred in United States). Further, Plaintiffs claim it would be unjust to allow foreign nations to escape liability for tortious acts performed in the United States if they could show that some act of planning the tort took place outside the United States.

Additionally, Defendants submit that, since the allegations are precisely those outlined in § 1605(a)(7)—that is, "personal injury or death that was caused by an act of ... extrajudicial killing, aircraft sabotage ... or the provision of material support or resources ... for such an act"—none of the other exceptions should be read to apply in its place.[25] Defendants

25. Judge Robertson recognized the same difficulty. Although he did consider Plaintiffs's claims under the tort exception, he found that the language of the state sponsor of terrorism exception buttressed his ultimate conclusion that the tortious acts exception would not provide subject matter jurisdiction over Prince Sultan and Prince Turki. Unlike (a)(7), the tort exception "makes no mention of the 'provision of material support.' " *Burnett II,* 292 F.Supp.2d at 20 n. 5. After reviewing canons of statutory construction counseling that Congress acts intentionally when it includes particular language in one section of a statute but omits it from another, Judge Robertson concluded that Congress's omission of 'provision of material support' from (a)(5) should be treated as intentional. *Id.; see also HCSC-Laundry v. United States,* 450 U.S. 1, 6, 101 S.Ct. 836, 67 L.Ed.2d 1 (1980) (per curiam) ("[I]t is a basic principle of statutory construction that a specific statute ... controls over a general provision ..., particularly when the two are interrelated and closely positioned.").

argue the Court's adjudication of Plaintiffs' claims would interfere with the executive branch's discretion to designate state sponsors of terror. *See* 28 U.S.C. § 1605(a)(7)(A) (listing statutes that give Secretary of State authority to designate countries as sponsors of terrorism). Finally, Defendants submit the purpose of(a)(5) was "to eliminate a foreign state's immunity for traffic accidents and other torts committed in the United States, for which liability is imposed under domestic tort law." *Amerada Hess,* 488 U.S. at 439–40, 109 S.Ct. 683; *Burnett II,* 292 F.Supp.2d at 19 (stating "the legislative history [of the FSIA] counsels that the exception should be narrowly construed so as not to encompass the farthest reaches of common law").

Plaintiffs respond that if Congress intended (a)(5) and (a)(7) to be mutually exclusive or intended that (a)(5) never apply in the terrorism context, Congress would have said so. Indeed, Congress did so very explicitly with respect to (a)(5) and (a)(2) and between (a)(7) and (a)(2). *See* § 1605(a)(5) (explaining exception can only be used in situations "not otherwise encompassed in paragraph (2)"); § 1605(a)(7) (same). To further buttress their argument, Plaintiffs note the two exceptions have been interpreted to encompass different situations. Subsection (a)(7) covers acts of terrorism committed abroad by a state sponsor of terrorism, while subsection (a)(5) governs tortious acts, including terrorism, performed in the United States. *See Flatow v. Islamic Republic of Iran,* 999 F.Supp. 1, 15 (D.D.C.1998) (finding (a)(7) applied to conduct outside the United States and stating "28 U.S.C. § 1605(a)(5) already provides jurisdiction over state-sponsored terrorist acts in the United States, . . . the state sponsored terrorism exception would be redundant if it were held to apply only within the United States"). Again, Plaintiffs argue that Defendants' argument of exclusivity would lead to absurd results, such that if a foreign sovereign not designated a state sponsor of terror was involved in a car accident stemming from negligence it would not be immune; but if it undertook a deliberate act of violence it would enjoy immunity from suit.

The Court understands Plaintiffs' desire to find a legal remedy for the horrible wrongs committed on September 11, 2001. If appropriate, however, these Defendants are entitled to immunity from litigating these gravely serious claims in this forum. Congress made a policy decision that the Executive branch, and not the courts, have the authority to label a foreign nation a terrorist. *See* 28 U.S.C. § 1605(a)(7)(A). But when it drafted the state sponsor of terror exception it did not include mutually exclusive language that would preclude the application of the torts exception here. It did include such language with respect to the commercial activities exception. *See* 28 U.S.C. § 1605(a)(7) ("A foreign state shall not be immune from jurisdiction of courts of the United States or of the States in any case—not otherwise covered by paragraph (2) above."); *see also* 28 U.S.C. § 1605(a)(5) ("A foreign state shall not be immune from jurisdiction of courts of the United States or of the States in any case—not otherwise encompassed in paragraph (2) above."). Particularly in a case such as this where interests of sovereignty, comity, international relations, and separation of powers are implicated, the Court must be vigilant to exercise discipline to apply the law only as it is written. While there are certainly obstacles to (a)(5)'s application—and the Court is not convinced the Plaintiffs have or can overcome them—the Court will not rule as a matter of law that subsections (a)(7) and (a)(5) are mutually exclusive. Accordingly, the Court will consider Plaintiffs' evidence

demonstrating the torts exception outlined in (a)(5) provides a basis for subject matter jurisdiction here.

[20] To fit within the exception outlined in § 1605(a)(5), the Plaintiffs must come forward with evidence demonstrating the Princes' or Kingdom's tortious acts or omissions caused Plaintiffs' injuries.[26] 28 U.S.C. § 1605(a)(5); *Virtual Countries*, 300 F.3d at 241; *Cargill*, 991 F.2d at 1016. "Any terrorist act, including the September 11 attacks, might have been the natural and probable consequence of knowingly and intentionally providing financial support to al Qaeda, given [the complaints'] allegations that, prior to September 11, al Qaeda and Osama bin Laden had proclaimed their intentions to commit murderous terrorist activities against the United States and its citizens, . . . and had accompanied these words with actions by implementing, and publicly acknowledging responsibility for, such terrorist schemes as the 1993 bombing of the World Trade Center, the 1998 attack of the U.S. embassies in Kenya and Tanzania, and the 2000 attack of the U.S.S. Cole in Yemen." *Burnett I*, 274 F.Supp.2d at 105; *see also Ashton* Complaint ¶¶ 105–108 (1993 World Trade Center attack), 130–136 (embassy bombings), 152–55 (Cole attack); *Federal* Complaint ¶ 77 (alleging Osama Bin Laden established al Qaeda to wage war with the United States).

a. Prince Sultan and Prince Turki

[21] Both Princes are alleged to have tortiously aided and abetted terrorism through their contributions to, and support of, Islamic charities that they knew or should have known were supporting terrorist organizations such as al Qaeda.[27] Additionally, Plaintiffs allege Prince Turki aided and abetted the terrorists by attempting to deflect their activities away from Saudi Arabia and by serving as a "facilitator of Osama bin Laden's network of charities." *Ashton* Complaint ¶ 261; *Burnett* Complaint ¶ 350. Plaintiffs allege both Princes must have known that the United States would have been al Qaeda's target, making the attacks on September 11 a foreseeable result of the Princes' actions.

[22–24] Pursuant to the Second Circuit's instruction, the Court must first determine whether the Princes' acts are tortious under New York law. *Robinson*, 269 F.3d at 142. In New York, conspiracy and aiding and abetting are varieties of concerted action liability. *Pittman v. Grayson*, 149 F.3d 111, 122 (2d Cir.1998). There must be "(1) an express or tacit agreement to 'participate in a common plan or design to commit a tortious act,' (2) tortious conduct by each defendant, and (3) the commission by one of the defendants, in pursuance of the agreement, of an act that constitutes a tort.' " *Id.* (quoting

26. Plaintiffs argue that Judge Robertson held them to an unnecessarily stringent theory of causation and submit that the D.C. Circuit's subsequent decision in *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123 (D.C.Cir.2004), effectively overrules the holding in *Burnett II*. *See Kilburn*, 376 F.3d at 1129 (evaluating a claim under § 1605(a)(7) and holding the requirement for jurisdictional causation was proximate cause). This Court does not read *Burnett II* as requiring but-for causation and Defendants agreed at oral argument that the proper inquiry at this stage of the litigation is the presence of proximate causation. *See* Sept. 14, 2004 Tr. at 121.

27. To the extent that the consolidated Plaintiffs and the *Federal* Plaintiffs allege that Prince Sultan and Prince Turki made donations in their personal capacities, *see, e.g., Ashton* Complaint ¶ 269 (Prince Sultan); *Federal* Complaint ¶¶ 451–52 (Prince Turki), those claims are not subject to the FSIA's protection. The Court will determine whether it has personal jurisdiction over Prince Sultan and Prince Turki in Part II.

Rastelli v. Goodyear Tire & Rubber Co., 79 N.Y.2d 289, 295, 582 N.Y.S.2d 373, 591 N.E.2d 222 (1992)). Conspiracy "requires an agreement to commit a tortious act." *Id.* at 122–23. Aiding and abetting "requires that the defendant have given substantial assistance or encouragement to the primary wrongdoer." *Id.* at 123. "[U]nder either theory, the defendant must know the wrongful nature of the primary actor's conduct." *Id.* (finding no concerted action liability where airline had no knowledge mother was removing daughter from country without father's approval).

i. Causation

Judge Robertson found his consideration of Prince Sultan's and Prince Turki's FSIA defenses did not present an opportunity for a general discourse on causation since Plaintiffs' theory would stretch causation to "terra incognita." *Burnett II*, 292 F.Supp.2d at 20. This Court agrees with Judge Robertson's conclusion, but it undertakes the causation analysis because a similar review will be necessary in its consideration of the Defendants' motions for failure to state a claim. *See* Part III below.

Plaintiffs place great reliance on *Halberstam v. Welch*, 705 F.2d 472 (D.C.Cir.1983) and *Boim v. Quranic Literacy Institute. & Holy Land Foundation for Relief & Development*, 291 F.3d 1000, 1023 (7th Cir.2002) ("*Boim II*"). Neither of these cases concern the tortious activity exception to the FSIA, but they do explain liability under the ATA and for aiding and abetting and conspiracy.[28] In *Halberstam*, the defendant was found liable as a joint venturer for a killing that occurred during a burglary at which she was not present. *Halberstam*, 705 F.2d at 488; *see also Lumbard v. Maglia, Inc.*, 621 F.Supp. 1529, 1536 (S.D.N.Y.1985) ("[T]hose who aid or abet or conspire in tortious conduct are jointly and severally liable with other participants in the tortious conduct, regardless of the degree of their participation or culpability in the overall scheme."). The court found that the defendant's intimate relationship with the burglar and her assistance in his other illegal ventures "defie[d] credulity that [she] did not know that something illegal was afoot." *Halberstam*, 705 F.2d at 486.

In *Boim*, the district court had denied a motion to dismiss by U.S.-based charities alleged to have aided and abetted international terrorism. *Boim v. Quranic Literacy Inst. & Holy Land Found.*, 127 F.Supp.2d 1002, 1018 (N.D.Ill.2001) ("*Boim I*"). The Seventh Circuit affirmed the decision and held that the parents of a yeshiva student killed in 1996 in Israel by members of the military wing of Hamas could prove that the defendants aided and abetted their son's murder under the ATA if they could demonstrate that the charities "knew of Hamas' illegal activities, that they desired to help those activities succeed, and they engaged in some act of helping the illegal activities." *Boim II*, 291 F.3d at 1023. The court explained that "[f]oreseeability is the cornerstone of

28. The court in *Halberstam* outlined the elements of aiding and abetting as: "(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation." *Halberstam*, 705 F.2d at 477. It described the elements of civil conspiracy as: "(1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; (4) which overt act was done pursuant to and in furtherance of the common scheme." *Id.*

proximate cause, and in tort law, a defendant will be held liable only for those injuries that might have reasonably been anticipated as a natural consequence of the defendant's actions." *Id.* at 1012. Plaintiffs submit the court's decision in *Boim*—that the ATA was designed "to extend liability to all points along the causal chain of terrorism"—supports the finding that Prince Sultan's and Prince Turki's conduct caused the attacks on September 11, 2001. *Id.* at 1011.

Plaintiffs exert much effort outlining the connections between al Qaeda and the Defendant charities that Prince Sultan and Prince Turki supported. Plaintiffs argue that the indirect nature of the Princes' contributions to al Qaeda is not fatal to their claims since they allegedly knew that funds they donated to the Defendant charities were being diverted to al Qaeda. *See* Bierstein Aff. in Opp. to Prince Sultan's Motion to Dismiss, Exs. 1–24. The Court has reviewed the exhibits on which Plaintiffs rely and finds only a handful relate to Plaintiffs' arguments.

Exhibit 11 is a report allegedly prepared for the President of the U.N. Security Council regarding a Saudi connection to terror financing. The report mentions Prince Sultan once in his role as the head of the Supreme Council of Islamic Affairs and does not conclude or suggest that he had any knowledge that charities to which he allegedly donated were funneling money to al Qaeda.

Exhibit 12 is a statement by the former French Minister of the Interior in which he claims to have met with Prince Sultan, Prince Turki, and other members of the Saudi Royal family in November 1994 and to have raised the "question of financial aid furnished by Saudi charitable organizations enjoying state support ... to Islamist movements or terrorist groups." The only charity he names in his statement is the World Islamic League, not one of the charities to which the Princes allegedly donated.

Exhibits 21–24 are excerpts from *The Muslim World* regarding Prince Sultan's donations to IIRO and the Joint Saudi Committee for Relief of Kosovar Refugees ("JSCR"). There is no indication in these exhibits that IIRO or JSCR was funneling donations to al Qaeda. Even construing these allegations and exhibits in the light most favorable to Plaintiffs, and drawing all inferences in their favor, none of these exhibits amount to admissible evidence that Prince Sultan or Prince Turki knew the charities they supported were fronts for al Qaeda.

Alternatively, Plaintiffs argue that, since Osama bin Laden and al Qaeda made no effort to hide their hatred for the United States, Prince Sultan and Prince Turki had to have been aware that the United States was a target, making the atrocities of September 11, 2001 a foreseeable result of their actions. *See, e.g.,* Bierstein Aff. in Opp. to Prince Sultan's Motion to Dismiss, Exs. 2–10, 14, 15, 18, 20 (including reports and fatwas summarizing Osama bin Laden's and al Qaeda's repeated public threats to and denouncement of the United States). There is no question that in the years leading up to the September 11 attacks, Osama bin Laden and al Qaeda were increasingly vocal in their hatred of the United States and its interests. The question remains, however, whether Plaintiffs have adequately alleged that Prince Sultan's and Prince Turki's specific acts aided and abetted those terrorists.

Both Prince Sultan and Prince Turki claim Plaintiffs cannot demonstrate their alleged tortious activity caused Plaintiffs' injuries. They argue that Plaintiffs ignore that Osama bin Laden also targeted the Saudi Royal family. *See, e.g.,* Bierstein Aff. in Opp. to Prince Sultan's Motion to

Dismiss, Ex. 16 (Prince Turki, "Allied Against Terrorism," September 17, 2002, *Washington Post*, editorial in which Prince Turki explains the Saudis' practice of sharing information regarding Osama bin Laden and al Qaeda with the CIA and states that al Qaeda also targeted the Kingdom); Exs. 3, 5, 6 (fatwas issued by Osama bin Laden and Sheikh Omar Abdel Rahman targeting Americans and expressing extreme bitterness toward the Saudi Royal family). Prince Sultan argues that Plaintiffs blur the distinction between charities he is on record of supporting, IIRO and WAMY, and those he is not, Al Haramain and MWL. *See supra* note 20. Both Princes also distinguish the instant case from *Boim* and other cases cited by the Plaintiffs on the basis that groups that they are alleged to have supported were not designated as terrorist organizations by the United States government. *See Boim II*, 291 F.3d at 1002 (noting Hamas was designated a terrorist organization by President Clinton in 1995 and by the Secretary of State in 1997); *see also* Consolidated Plaintiffs' Opp. to Prince Sultan's Motion to Dismiss at 16–17 (citing *Flatow*, 999 F.Supp. at 18 (holding Iran, a state sponsor of terrorism, liable as provider of material support to terrorist organization Palestine Islamic Jihad pursuant to 18 U.S.C. § 1605(a)(7)); *Smith v. Islamic Emirate of Afghanistan*, 262 F.Supp.2d 217, 232 (S.D.N.Y.2003) (granting default judgment against Iraq, a designated state sponsor of terror, after plaintiffs demonstrated it provided material support to Osama bin Laden and al Qaeda)); Consolidated Plaintiffs' Opp. to Prince Turki's Motion to Dismiss at 8 (same).

Although they did not involve New York law, the Court agrees that *Halberstam* and *Boim* are instructive. In *Halberstam*, the defendant enjoyed an extravagant lifestyle made entirely possible by her long-term live-in boyfriend's regular burglaries. The court concluded that she had to know of his criminal activities because she acted as a money launderer for her boyfriend's stolen metals business. *Halberstam*, 705 F.2d at 486–88. The court found the defendant was so close to the illegal activity that she had to be aware of her role in it. *Id.* at 486. In *Boim*, the court denied the defendants' motion to dismiss because the complaint contained specific factual allegations tying the defendants to Hamas. For example, one defendant entity allegedly employed an individual designated as a terrorist affiliated with Hamas, another entity admitted providing funds to Hamas, two individual defendants had documented and admitted ties to Hamas, and numerous links existed between the individual terrorist defendants and the entity defendants. *Boim I*, 127 F.Supp.2d at 1006–1008. Unlike Hamas in *Boim*, none of the organizations the Princes are alleged to have supported in an official capacity were designated a sponsor of terrorism at the time of the alleged contributions. In fact, only BIF and certain branches of Al Haramain have since been designated. *See* Exec. Order No. 13224 (designating BIF (November 19, 2002) and branches of Al Haramain (Bosnia, Somalia on March 11, 2002; Indonesia, Kenya, Pakistan, Tanzania on January 22, 2004; Afghanistan, Albania, Bangladesh, Ethiopia, the Netherlands on June 2, 2004)). Thus, pursuant to *Boim*, the Plaintiffs would have to allege specific facts showing that the Princes knew or should have known that the charities they supported were actually fronts for al Qaeda. *See Burnett I*, 274 F.Supp.2d at 106.

[25–27] Plaintiffs have pleaded al Qaeda's repeated, public targeting of the United States. They have not, however, pleaded facts to support an inference that the Princes were sufficiently close to the terrorists' illegal activities to satisfy *Halber-*

stam or New York law. Similarly, Plaintiffs have not pleaded facts to suggest the Princes knew they were making contributions to terrorist fronts and provided substantial assistance or encouragement to the terrorists to satisfy *Boim* or New York law. The Court has reviewed the complaints in their entirety and finds no allegations from which it can infer that the Princes knew the charities to which they donated were fronts for al Qaeda. The Court is not ruling as a matter of law that a defendant cannot be liable for contributions to organizations that are not themselves designated terrorists. But in such a case, there must be some facts presented to support the allegation that the defendant knew the receiving organization to be a solicitor, collector, supporter, front or launderer for such an entity. There must be some facts to support an inference that the defendant knowingly provided assistance or encouragement to the wrongdoer. Here, there are no such factual bases presented, there are only conclusions. *See Robinson*, 269 F.3d at 146 ("[W]e note that the conclusory nature of [plaintiff's] allegations alone would give us pause before we would allow them to sustain jurisdiction.") (citing *Zappia Middle East Const. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 253 (2d Cir.2000) (finding, in context of FSIA 12(b)(1) motion, conclusory allegations in plaintiffs affidavit insufficient to sustain jurisdiction)). The law does not permit Plaintiffs

> to circumvent the jurisdictional hurdle of the FSIA by inserting vague and conclusory allegations of tortious conduct in their complaints—and then ... rely on the federal courts to conclude that some conceivable non-discretionary tortious act falls within the purview of these generic allegations under the applicable substantive law. This is at odds with the goal of the FSIA to enable a foreign government to obtain an early dismissal when the substance of the claim against it does not support jurisdiction.

Robinson, 269 F.3d at 146.

ii. Discretionary Function

Plaintiffs argue that there is no discretion to conduct illegal activities and the so-called discretionary function exception to the tortious act exception should not apply to Prince Sultan or Prince Turki. *See, e.g., Liu v. Republic of China*, 892 F.2d 1419, 1421, 1431 (9th Cir.1989) (finding no discretion to violate Chinese law prohibiting murder where gunmen acting on direction of China's Director of Defense Intelligence Bureau killed plaintiff's husband); *Birnbaum v. United States*, 588 F.2d 319, 329–30 (2d Cir.1978) (finding in FTCA case that the CIA had no authority and therefore no discretion to open U.S. first class mail departing for and arriving from the Soviet Union); *Glickman v. United States*, 626 F.Supp. 171, 175 (S.D.N.Y.1985) (finding in FTCA case that CIA agent's secret administration of LSD to plaintiff was not discretionary function); *Letelier v. Republic of Chile*, 488 F.Supp. 665, 673 (D.D.C.1980) (holding no discretion to order or aid assassination of former Chilean ambassador and foreign minister). Prince Sultan insists that any recommendation of government grants to Islamic charities was a discretionary function. Prince Turki makes a similar argument regarding his actions as the head of DGI and urges the Court to find that all of his alleged actions should be subsumed by the discretionary function exception.

[28] The Court finds the discretionary function exception independently bars Plaintiffs' claims against Prince Sultan and Prince Turki. Both Princes are accused of donating money or recommending government grants to charities that allegedly supported al Qaeda. As the head of DGI,

Prince Turki is also alleged to have attempted to protect Saudi Arabia from terrorism and to have implemented the Kingdom's foreign relations with the Taliban and Osama bin Laden. In determining whether these were discretionary functions, the Court must decide whether the actions involved an element of choice or judgment based on considerations of public policy. *See Callahan v. United States,* 329 F.Supp.2d 404, 408 (S.D.N.Y.2004) (interpreting FTCA); *Berkovitz v. United States,* 486 U.S. 531, 536, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988) (construing FTCA).

[29, 30] There can be little doubt that, as the chairman of the Supreme Council of Islamic Affairs, charged with making recommendations to the Council of Ministers regarding requests for aid from Islamic organizations located abroad, and as the head of the Special Committee of the Council of Ministers, charged with deciding which grants should be made to Islamic charities, Prince Sultan's decisions were made at the planning level of government, *Kline,* 685 F.Supp. at 392, and "grounded in social, economic, and political policy," *Varig Airlines,* 467 U.S. at 814, 104 S.Ct. 2755. Similarly, as the head of DGI, Prince Turki's decisions regarding the treatment of the Taliban and Osama bin Laden were judgments based on considerations of public policy. *See Callahan v. United States,* 329 F.Supp.2d at 408; *see also Burnett II,* 292 F.Supp.2d at 20–21 ("[T]his conclusion would be nearly self-evident: Prince Turki, as director of intelligence, taking acts to protect Saudi Arabia from terrorism, and Prince Sultan, as chairman of the Supreme Council, making recommendations to the Council of Ministers about requests for assistance from Islamic organizations outside Saudi Arabia or, as head of the Special Committee, deciding what disbursements should be made to Islamic charitable organizations, were clearly making 'decisions grounded in social, economic, and political policy.' ") (quoting *Varig Airlines,* 467 U.S. at 814, 104 S.Ct. 2755).

Accordingly, to the extent that Plaintiffs allege acts Prince Sultan and Prince Turki performed in their official capacities, Prince Sultan's and Prince Turki's motions to dismiss the certain consolidated complaints [29] and the *Federal* complaint are granted. The Court denies Plaintiffs' request for jurisdictional discovery because Plaintiffs have not presented any factual basis for believing that discovery might reasonably be expected to result in evidence that would overcome the discretionary function exception. *See* 28 U.S.C. § 1605(a)(5)(A) (exception not applicable to "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused.") The Court will consider the appropriateness of exercising personal jurisdiction over Prince Sultan's and Prince Turki's personal acts in Part II below.

b. Kingdom of Saudi Arabia

There is no dispute that the Kingdom of Saudi Arabia is a foreign state within the meaning of the FSIA. *Federal* Complaint ¶ 63. The *Federal* Plaintiffs have the "burden of going forward with evidence that, under exceptions to the FSIA, immunity should not be granted." *Virtual Countries,* 300 F.3d at 241 (internal quotations omitted). As explained above, the only possible applicable exception is the torts exception under 28 U.S.C. § 1605(a)(5).

[31, 32] The *Federal* Plaintiffs' allegations arise "predominantly from miscon-

29. The consolidated complaints are *Ashton, Barrera, Burnett, Salvo,* and *Tremksy.*

duct of ostensible charities under the Kingdom's control." Federal Opp. to Motion to Dismiss of the Kingdom of Saudi Arabia at 1.[30] Thus, the *Federal* Plaintiffs claim the Kingdom of Saudi Arabia aided and abetted the terrorists through these charities. In attempting to overcome the presumption of the Kingdom's sovereign immunity, the *Federal* Plaintiffs argue the merits of their claims against the charities.[31] Based on news accounts that the Kingdom has dissolved its international charities and terrorist financing reports that implicate certain charities, the *Federal* Plaintiffs urge the Court to find that the Kingdom had previously willfully ignored the charities' support for terrorism. *See, e.g.,* Federal Opp. to Kingdom of Saudi Arabia Motion to Dismiss Ex. 2 ("Terrorist Financing, Report of an Independent Task Force Sponsored by the Council on Foreign Relations"), Ex. 3 (CNN.com June 2, 2004 "Saudis reform charities as antiterror measure" (mentioning only Al Haramain Islamic Foundation)), Ex. 5 (Senate Subcommittee Testimony, July 31, 2003 by Steven Emerson with Jonathan Levin, "Terrorism Financing: Origination, Organization, and Prevention: Saudi Arabia, Terrorist Financing and the War on Terror").

In response, the Kingdom argues that Plaintiffs ignore Osama bin Laden's public targeting of the Kingdom. *See, e.g.,* Bierstein Aff. in Opp. to Prince Sultan's Motion to Dismiss, Ex. 3 & 4; *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States,* 48, 373 (July 2004) (hereinafter "*9/11 Report*"). The Kingdom also submits it has worked with the United States to share information in the fight against terrorism. *9/11 Report,* at 115–22; Prince Turki Decl. ¶¶ 7, 8, 10. The U.S. State Department has not designated the Kingdom a state sponsor of terrorism. Additionally, the presidentially-appointed September 11 commission found no evidence of the Kingdom's funding or support for the September 11 terrorists. *9/11 Report,* at 171 ("[W]e have found no evidence that the Saudi government as an institution or senior Saudi officials individually funded the organization.").

The Court finds the Plaintiffs' allegations cannot overcome the discretionary function exception to the tortious acts exception. *Marchisella v. Gov't of Japan,* 2004 WL 307248, at *2 (explaining acts performed at the planning, as opposed to operational, level of government are protected by immunity); *Robinson,* 269 F.3d at 146 (noting conclusory nature of allega-

30. The *Federal* Plaintiffs allege that each of the following charities, which are all named as Defendants and represented by counsel in these actions, are agencies, instrumentalities, arms or organs of the Kingdom: MWL, IIRO, WAMY, Al Haramain Islamic Foundation, Saudi High Commission for Relief to Bosnia and Herzegovina, SJRC, Rabita Trust, Saudi Red Crescent, and BIF. The Kingdom disputes the instrumentality status of MWL, IIRO, WAMY, Al Haramain Islamic Foundation, Rabita Trust, and BIF. These Plaintiffs request discovery as to the instrumentality status of these charities. The request is denied at this time and may be more appropriate when the Court considers each of the charities' motions to dismiss.

31. Rather than pleading specific facts showing that the Kingdom caused Plaintiffs' injuries, the *Federal* Plaintiffs focus predominantly on the charities' actions. For example, these Plaintiffs argue that the Kingdom has waived the defense of sovereign immunity because certain charities, which have not been designated as instrumentalities of the Kingdom and which are represented by separate counsel, did not raise the FSIA defense in their motions to dismiss. The Court is not convinced by this argument because the waiver of FSIA immunity must be explicit. *See Banco de Seguros del Estado v. Mutual Marine Office, Inc.,* 344 F.3d 255, 261 (2d Cir.2003).

tions would not sustain jurisdiction). Saudi Arabia's treatment of and decisions to support Islamic charities are purely planning level "decisions grounded in social, economic, and political policy." *Varig Airlines*, 467 U.S. at 814, 104 S.Ct. 2755; *see also Kline*, 685 F.Supp. at 392. The *Federal* Plaintiffs have not met their burden of demonstrating an exception to the FSIA applies to negate the Kingdom's immunity. "[S]overeign immunity under the FSIA is immunity from suit, not just from liability." *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir.1994). Because there were no factual disputes raised in the Court's resolution of this motion, no jurisdictional discovery is necessary. *See Filetech S.A. v. France Telecom S.A.*, 304 F.3d 180, 183 (2d Cir.2002). The Kingdom of Saudi Arabia's motion to dismiss the *Federal* complaint for lack of subject matter jurisdiction is granted.

II. Personal Jurisdiction

[33–36] To avoid dismissal for lack of personal jurisdiction under Rule 12(b)(2), Plaintiffs must establish personal jurisdiction over each Defendant. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 784 (2d Cir.1999). Because these motions are brought before discovery and decided without an evidentiary hearing, Plaintiffs need only make a prima facie showing that personal jurisdiction exists. *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1108 (2d Cir.1997); *A.I. Trade Finance, Inc. v. Petra Bank*, 989 F.2d 76, 79 (2d Cir.1993). Plaintiffs may rely entirely on factual allegations, *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 184 (2d Cir. 1998), and they will prevail even if Defendants make contrary arguments, *A.I Trade*, 989 F.2d at 79. In resolving the motions, the Court will read the complaints and affidavits in a light most favorable to Plaintiffs. *PDK Labs*, 103 F.3d at 1108. It will not, however, accept legally conclusory assertions or draw "argumentative inferences." *Mende v. Milestone Tech., Inc.*, 269 F.Supp.2d 246, 251 (S.D.N.Y.2003) (citing *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir.1994)).

A. Bases for Personal Jurisdiction

1. New York Long–Arm Statute

[37] "In a federal question case where a defendant resides outside the forum state, a federal court applies the forum state's personal jurisdiction rules if the federal statute does not specifically provide for national service of process." *PDK Labs*, 103 F.3d at 1108. Similarly, a federal court sitting in diversity exercises personal jurisdiction over a foreign defendant to the same extent as courts of general jurisdiction of the state in which it sits pursuant to Federal Rule of Civil Procedure 4(k)(1)(A). *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 124 (2d Cir.2002). In such cases, courts must determine if New York law would confer jurisdiction through its long-arm statute, and then decide if the exercise of such jurisdiction comports with the requisites of due process under the Fourteenth Amendment. *Id.* (citing *Bank Brussels*, 171 F.3d at 784); *Bensusan Rest. Corp. v. King*, 126 F.3d 25, 27 (2d Cir.1997).

a. Conspiracy Theory

Plaintiffs claim that New York's long-arm statute provides a basis for personal jurisdiction. Rule 302(a)(2) of New York's Civil Practice Law & Rules states in part: "(a) As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent ... (2) commits a tortious act

within the state ...." N.Y. C.P.L.R. § 302(a)(2) (McKinney 2002). Courts have defined "agent" to include a defendant's co-conspirators "under certain circumstances." *Chrysler Capital Corp. v. Century Power Corp.*, 778 F.Supp. 1260, 1266 (S.D.N.Y.1991) (citing *Lehigh Valley Indus., Inc. v. Birenbaum*, 389 F.Supp. 798, 806–07 (S.D.N.Y.1975), *aff'd*, 527 F.2d 87 (2d Cir.1975)). Thus, "acts committed in New York by the co-conspirator of an out-of-state defendant pursuant to a conspiracy may subject the out-of-state defendant to jurisdiction under C.P.L.R. 302(a)(2)." *Chrysler Capital Corp.* 778 F.Supp. at 1266.

[38–40] Plaintiffs are not required to establish the existence of a "formal agency relationship" between the Defendants and their putative co-conspirators. *Daventree Ltd. v. Republic of Azerbaijan*, 349 F.Supp.2d 736, at 759, 2004 WL 2997881, at *18 (S.D.N.Y.2004). Yet, "the bland assertion of conspiracy ... is insufficient to establish jurisdiction for the purposes of section 302(a)(2)." *Lehigh Valley Indus. Inc.*, 527 F.2d at 93–94; *Lamarr v. Klein*, 35 A.D.2d 248, 315 N.Y.S.2d 695, 697–98 (1st Dep't 1970) (holding that conclusory statements about defendant's role in conspiracy were insufficient to establish jurisdiction under the co-conspirator doctrine). To establish personal jurisdiction on a conspiracy theory, Plaintiffs must make a prima facie showing of conspiracy, allege specific facts warranting the inference that the defendant was a member of the conspiracy, and show that the defendant's co-conspirator committed a tort in New York. *Chrysler Capital Corp.*, 778 F.Supp. at 1266 (citing *Singer v. Bell*, 585 F.Supp. 300, 302 (S.D.N.Y.1984)).

[41] "To plead a valid cause of action for conspiracy under New York law, a plaintiff must allege the primary tort and four elements: '(a) a corrupt agreement between two or more persons, (b) an overt act in furtherance of the agreement, (c) the parties' intentional participation in the furtherance of a plan or purpose, and (d) the resulting damage or injury.'" *Chrysler Capital Corp.* 778 F.Supp. at 1267 (quoting *Kashi v. Gratsos*, 790 F.2d 1050, 1055 (2d Cir.1986)). To warrant the inference that a defendant was a member of the conspiracy, Plaintiffs must show that "(a) the defendant had an awareness of the effects in New York of its activity; (b) the activity of the co-conspirators in New York was to the benefit of the out-of-state conspirators; and (c) the co-conspirators acting in New York acted 'at the direction or under the control' or 'at the request of or on behalf of' the out-of-state defendant." *Chrysler Capital Corp.*, 778 F.Supp. at 1268–69 (quoting *Dixon v. Mack*, 507 F.Supp. 345, 350 (S.D.N.Y.1980)).

"Whether an alleged conspiracy ... existed is 'a mixed question of law and fact.'" *Daventree*, 349 F.Supp.2d 736, at 760, 2004 WL 2997881, at *19 (quoting *Mario Valente Collezioni Ltd. v. Confezioni Semeraro Paolo, S.R.L.*, 264 F.3d 32, 36 (2d Cir.2001)). Accordingly, the Court cannot accept "conclusory assertions on those issues; instead it must resolve such questions based upon an independent examination of the factual allegations while mindful of its duty to draw all factual inferences in plaintiffs' favor." *Id.* (rejecting conspiracy theory of personal jurisdiction without permitting jurisdictional discovery).

[42] Plaintiffs claim that all Defendants in these actions conspired with the al Qaeda terrorists to perpetrate the attacks of September 11. *See, e.g., Ashton* Complaint ¶ 296; *Federal* Complaint ¶¶ 66, 72–74. Without supporting factual allegations, such a statement is insufficient to establish an agency relationship. *Lehigh Valley Indus. Inc.*, 527 F.2d at 93–94; *Daventree*, 349 F.Supp.2d 736 at 762–63, 2004

WL 2997881, at *22 (citing *First Capital Asset Mgmt. v. Brickellbush, Inc.* 218 F.Supp.2d 369, 395 (S.D.N.Y.2002)). As will be highlighted below, the complaints do not allege any specific facts from which the Court could infer that Prince Sultan, Prince Turki, Mohammed Abdullah Aljomaih, Sheikh Hamad Al–Husani, or Abdulrahman bin Mahfouz directed, controlled, or requested al Qaeda to undertake its terrorist activities. Nor are there any specific allegations of their knowledge of, or consent to those activities. *See Daventree,* 349 F.Supp.2d 736 at 762–63, 2004 WL 2997881, at *22 (finding no personal jurisdiction under a conspiracy theory because there was no basis from which the court could impute to defendants the conduct of their putative co-conspirators); *Chrysler Capital Corp.,* 778 F.Supp. at 1266 (requiring specific facts warranting the inference that the defendant was a member of the conspiracy). Accordingly, for Prince Sultan, Prince Turki, Mohammed Abdullah Aljomaih, Sheik Hamad Al–Husani, and Abdulrahman bin Mahfouz, personal jurisdiction cannot be based on a New York long-arm conspiracy theory. The Court will examine the possibility of exercising conspiracy theory personal jurisdiction over the remaining moving Defendants when it examines the specific claims against each of them below.

2. Federal Rule of Civil Procedure 4(k)

Under Federal Rule of Civil Procedure 4(k)(1)(D), service of process will establish personal jurisdiction over a defendant when so authorized by a federal statute.[32] Here, the ATA contains a nationwide service of process provision, such that proper service will confer personal jurisdiction.[33] 18 U.S.C. § 2334(a) (providing for nationwide service of process and venue); *Burnett I,* 274 F.Supp.2d at 95–96. Courts asked to analyze personal jurisdiction under the ATA's national service of process provision have concluded that a plaintiff "must demonstrate that the defendant has sufficient minimum contacts to satisfy a traditional due process analysis." *Estates of Ungar v. Palestinian Auth.,* 153 F.Supp.2d 76, 95 (D.R.I.2001); *see also Biton v. Palestinian Interim Self–Gov't Auth.,* 310 F.Supp.2d 172, 179 (D.D.C. 2004) (dismissing complaint pursuant to 18 U.S.C. § 2333 because individual defendants lacked contacts with the United States). "The relevant inquiry under such circumstances is whether the defendant has minimum contacts with the United States as a whole [to satisfy Fifth Amendment due process requirements], rather than . . . with the particular state in which the federal court sits." *Ungar,* 153 F.Supp.2d at 87. Many of the moving

32. Although the Court does not have subject matter jurisdiction over any of the moving Defendants pursuant to the FSIA, that statute also provides for personal jurisdiction if service is proper and subject matter jurisdiction has been established. 28 U.S.C. § 1330(b) ("[P]ersonal jurisdiction over a foreign defendant shall exist as to every claim for relief of which the district courts have jurisdiction . . . where service has been made under section 1608 of this title."); *Rein v. Socialist People's Libyan Arab Jamahiriya,* 995 F.Supp. 325, 329–330 (E.D.N.Y.1998).

33. The *Federal* Plaintiffs pursue claims under RICO, which some courts outside the Second Circuit have held also provides for nationwide service of process and jurisdiction. *See* 18 U.S.C. § 1965; *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.,* 119 F.3d 935, 942 (11th Cir.1997) (finding 18 U.S.C. § 1965(d) provides for nationwide jurisdiction); *cf. PT United Can Co. Ltd. v. Crown Cork & Seal Co., Inc.,* 138 F.3d 65, 71 (2d Cir.1998) (finding " § 1965 does not provide for nationwide personal jurisdiction over every defendant in every civil RICO case, no matter where the defendant is found"). The *Federal* Plaintiffs do not use their RICO claims as a basis for personal jurisdiction and the Court focuses on the ATA.

Defendants either dispute the manner in which they were served or were not served in the United States. Accordingly, the Court must consider an alternative basis for personal jurisdiction.

[43] If the New York long-arm statute or the ATA does not establish personal jurisdiction, the Court will engage in a Rule 4(k)(2) analysis. Rule 4(k)(2) states:

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

Fed.R.Civ.P. 4(k)(2). Rule 4(k)(2) "fill[s] a gap in the enforcement of federal law" for courts to exercise personal jurisdiction over defendants with sufficient contacts with the United States generally, but insufficient contacts with any one state in particular. Fed.R.Civ.P. 4(k)(2) advisory committee's note; *United States v. Int'l Bhd. of Teamsters*, 945 F.Supp. 609, 616–17 (S.D.N.Y.1996). For jurisdiction under Rule 4(k)(2), there must be a federal claim, personal jurisdiction must not exist over the defendant in New York or any other state, and the defendant must have sufficient contacts with the United States as a whole such that the exercise of jurisdiction does not violate Fifth Amendment due process. *Int'l Bhd. of Teamsters*, 945 F.Supp. at 617.

a. Purposefully Directed Activities Theory

Personal jurisdiction based on Rule 4(k) requires minimum contacts with the United States to satisfy Fifth Amendment due process requirements. Plaintiffs claim these requirements are met because Defendants purposefully directed their activities at the United States. *Burger King v. Rudzewicz*, 471 U.S. 462, 472, 479, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) (explaining jurisdiction is appropriate if defendant "purposefully directed his activities at residents of the forum and the litigation results from alleged injuries that arise out of or relate to those activities" and finding minimum contacts existed since dispute arose from a contract with substantial contacts with the forum) (internal quotations and citations omitted); *Calder v. Jones*, 465 U.S. 783, 789, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984) (finding personal jurisdiction appropriate over non-resident defendants who "expressly aimed" intentionally tortious conduct at residents of forum state, even where defendants were never physically present in forum); *see also Daventree*, 349 F.Supp.2d 736 at 762–63, 2004 WL 2997881, at *22 (finding exercise of personal jurisdiction under Rule 4(k)(2) is appropriate if defendants "purposefully directed their activities at residents of the forum, and the litigation results from alleged injuries that arise out of or related to those activities"). Pursuant to the holdings in *Burger King, Calder*, and three recent terrorism cases—*Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F.Supp. 325 (E.D.N.Y.1998), *Daliberti v. Republic of Iraq*, 97 F.Supp.2d 38 (D.D.C. 2000), and *Pugh v. Socialist People's Libyan Arab Jamahiriya*, 290 F.Supp.2d 54 (D.D.C.2003)—Plaintiffs submit that the moving Defendants knew that the primary target of Osama bin Laden's and al Qaeda's campaign of terror was the United States and that by providing assistance to these terrorists, who Plaintiffs claim were Defendants' co-conspirators, Defendants aimed their conduct at the United States.

In *Rein*, the court denied defendants' motions to dismiss for lack of subject matter and personal jurisdiction in a case aris-

ing from the bombing of Pan Am Flight 103 over Lockerbie, Scotland. The court found it had subject matter jurisdiction over defendant Libya, a designated state sponsor of terror, pursuant to § 1605(a)(7) of the FSIA. *Rein*, 995 F.Supp. at 329–30. Noting that the FSIA provides for personal jurisdiction as long as subject matter jurisdiction exists and proper service was effected, the court turned to Libya's contacts with the United States. *Id.* at 330 (citing *Burger King*, 471 U.S. at 472, 105 S.Ct. 2174). It found that Libya's contacts with the United States were sufficient because its allegedly "intentional, tortious actions [were] ... 'expressly aimed at' the United States," and included "destruction of a United States flag aircraft ... while en route to the United States ... with 189 United States nationals on board." *Id.* (citing *Calder*, 465 U.S. at 789, 104 S.Ct. 1482). The court concluded that its exercise of personal jurisdiction was appropriate since "[a]ny foreign state would know that the United States has substantial interests in protecting its flag carriers and its nationals from terrorist activities and should reasonably expect that if these interests were harmed, it would be subject to a variety of potential responses, including civil actions in the United States." *Id.*

Similarly, in *Daliberti* the court found it had subject matter jurisdiction over defendant Iraq, a designated state sponsor of terror, in a case stemming from the alleged torture of several United States citizens who were working in Kuwait. *Daliberti*, 97 F.Supp.2d at 46. Iraq argued that exercising personal jurisdiction over it would offend constitutional due process since the FSIA "abrogates the minimum contacts requirement." *Id.* at 52. The court disagreed and explained that "Congress expressly addressed the minimum contacts requirement in enacting the FSIA by providing that '[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction.'" *Id.* (citing 28 U.S.C. § 1330(b); *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1020 (2d Cir.1991)). The court acknowledged that the foreign state's contacts with the United States might be more attenuated in the context of the state sponsor of terrorism exception than in the FSIA's other exceptions, but concluded "in the context of this statute, the purpose for which it was enacted, and the nature of the activity toward which it is directed, ... it is reasonable that foreign states be held accountable in the courts of the United States for terrorist actions perpetrated against U.S. citizens anywhere." *Id.* at 54. Finally, it noted that the "detention of these three plaintiffs had a direct effect in the United States and was consciously designed to affect United States policy ... Iraq cannot now claim surprise at the assertion of jurisdiction by this Court." *Id.*

Most recently, in *Pugh*, representatives of passengers killed in the bombing of a French airliner in Africa survived a motion to dismiss by the individual defendants. The court found it had subject matter jurisdiction over seven Libyan officials, including Muammar Qadhafi, pursuant to the state sponsor of terrorism exception of the FSIA outlined in § 1605(a)(7). *Pugh*, 290 F.Supp.2d at 58. In its personal jurisdiction analysis, the court concluded that the individuals had sufficient contacts with the United States to satisfy due process since they had "conspired to sabotage" a flight, which was scheduled to "stop in several nations," thus making it foreseeable that "passengers of many nationalities would be on board." *Id.* at 59. From their actions, the defendants could have expected to be haled into "the courts of those nations whose citizens would die." *Id.* Given the number of passengers on the plane, it was also foreseeable that Ameri-

cans would be on board. *Id.* Finally, the court reasoned that the "interest of the United States in preventing and punishing international terrorism has been a matter of worldwide common knowledge for years." *Id.* (citing statutes criminalizing terrorist acts). "It logically follows that if federal courts may constitutionally exercise criminal jurisdiction over such individuals, the Constitution should be no bar to those same federal courts, in a civil action ... exercising civil *in personam* jurisdiction over those same individuals for the same acts." *Id.*

[44] The courts in *Rein, Daliberti,* and *Pugh* properly exercised personal jurisdiction over each of the defendants in those cases pursuant to the FSIA, which specifically provides that personal jurisdiction exists where proper service and subject matter jurisdiction have been established. 28 U.S.C. § 1330(b); *Rein,* 995 F.Supp. at 329–30; *Daliberti,* 97 F.Supp.2d at 52; *Pugh,* 290 F.Supp.2d at 58. While the FSIA is not the basis for personal jurisdiction here, jurisdiction based on the ATA or Rule 4(k)(2) also requires minimum contacts with the United States. Accordingly, Plaintiffs may rely on their "purposefully directed" theory to establish these minimum contacts. But as existed in *Burger King, Calder,* and the three terrorism cases, Plaintiffs must allege some personal or direct involvement by the Defendants in the conduct giving rise to their claims. *See, e.g., Daliberti,* 97 F.Supp.2d at 41 (explaining that defendant Iraq had held and tortured plaintiffs and that three of four plaintiffs were released only after U.S. officials' explicit negotiations with their Iraqi counterparts); *Pugh,* 290 F.Supp.2d at 56 (noting that seven individual Libyan defendants were sued in the United States after extensive official French investigation and that these defendants were deemed to be responsible for the bombings in both civil and criminal proceedings); *see also In re Magnetic Audiotape,* 334 F.3d at 208 (2d (stating a "court may exercise personal jurisdiction over defendant consistent with due process when defendant is primary participant in intentional wrongdoing—albeit extraterritorially—expressly directed at forum") (citing *Calder v. Jones,* 465 U.S. at 789–90, 104 S.Ct. 1482)); *Time, Inc. v. Simpson,* No. 02 Civ. 4917(MBM), 2003 WL 23018890, at *5 (S.D.N.Y. Dec. 22, 2003) (finding *Calder* turned on "personal involvement of the individual defendants in the particular conduct that gave rise to the plaintiff's claim" and granting motion to dismiss because plaintiff had not demonstrated that defendant had had any personal involvement in the events giving rise to the lawsuit). Accordingly, regardless of whether personal jurisdiction is based on the ATA's nationwide service of process provision or Rule 4(k)(2), to satisfy the Fifth Amendment's due process requirements, Plaintiffs must make a prima facie showing of each Defendant's personal or direct participation in the conduct giving rise to Plaintiffs' injuries.

3. Mass Torts Theory

[45] In addition to the arguments articulated above, the *Federal* Plaintiffs submit that the Court should utilize a modified due process standard appropriate for mass torts. *See, e.g.,* Federal Prince Turki Opp. at 23; Federal Prince Mohammed Opp. at 12; SAAR Network Opp. at 12–13. Courts in the Eastern District of New York have outlined the modified standard in products liability cases as follows: the state's interests in the litigation replace contacts with the forum as the constitutional touchstone and the "reasonableness" inquiry is replaced with a hardship analysis. *Simon v. Philip Morris,* 86 F.Supp.2d 95, 129 (E.D.N.Y.2000); *In re DES Cases,* 789 F.Supp. 552, 587 (E.D.N.Y.1992). The

Court declines to adopt this standard. There was no question that, at a minimum, the defendants in these products liability actions had substantial contacts with the forum, in these cases being New York, and were involved in the sale or production of the products at issue. *In re DES Cases*, 789 F.Supp. at 559; *Simon*, 86 F.Supp.2d at 99–100. Here, however, there are questions as to the Defendants' contacts with the forum, whether it be the United States generally or New York specifically, and the Defendants' alleged involvement with al Qaeda is much more attenuated.

B. Due Process Requirements

[46–49] Any exercise of personal jurisdiction must comport with the requirements of due process. "The due process test for personal jurisdiction has two related components: the 'minimum contacts' inquiry and the 'reasonableness' inquiry." *Metro. Life Ins. Co. v. Robertson–Ceco Corp.*, 84 F.3d 560, 567 (2d Cir.1996). Depending on the basis for personal jurisdiction, due process under either the Fifth or Fourteenth Amendment applies. "[T]he due process analysis is basically the same under both the Fifth and Fourteenth Amendments. The principal difference is that under the Fifth Amendment the court can consider the defendant's contacts throughout the United States, while under the Fourteenth Amendment only the contacts with the forum state may be considered." *Chew v. Dietrich*, 143 F.3d 24, 28 n. 4 (2d Cir.1998). Here, personal jurisdiction under the New York long-arm statute requires minimum contacts with New York pursuant to the Fourteenth Amendment. The exercise of personal jurisdiction under Rule 4(k) requires contacts with the United States as a whole pursuant to the Fifth Amendment.

1. Minimum Contacts

[50, 51] Minimum contacts are required so "that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945); *see also World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). The minimum contacts requirement is also known as "fair warning," such that the defendant's contacts with the forum should be sufficient to make it reasonable to be haled into court there. *Burger King*, 471 U.S. at 474, 105 S.Ct. 2174. The " 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at the residents of the forum ... and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Id.* (internal citations omitted); *see also World–Wide Volkswagen*, 444 U.S. at 297–98, 100 S.Ct. 559 (finding purposefully directed activities where defendant delivered products into stream of commerce with expectation they would be purchased by residents of forum); *Calder*, 465 U.S. at 789–90, 104 S.Ct. 1482 (finding publishing activities outside of forum were calculated to cause injury to plaintiff in forum where she lived and which also had the highest subscription rate). "Although it has been argued that foreseeability of causing *injury* in another State should be sufficient to establish such contacts there when policy considerations so require, the Court has consistently held that this kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction." *Burger King*, 471 U.S. at 474, 105 S.Ct. 2174 (quoting *World–Wide Volkswagen*, 444 U.S. at 295, 100 S.Ct. 559). In every case, there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* (quoting

Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)).

[52] For purposes of the minimum contacts inquiry, a distinction is made between specific and general jurisdiction. Specific jurisdiction exists when the forum exercises jurisdiction over the defendant in a suit arising out of the defendant's contacts with that forum. *Metro. Life Ins.* 84 F.3d at 567–68. General jurisdiction is based on the defendant's general business contacts with the forum; because the defendant's contacts are not related to the suit, a considerably higher level of contacts is generally required.[34] *Id.* at 568.

2. Reasonableness

[53] In determining whether the exercise of personal jurisdiction is reasonable, a court is to consider:

> (1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests in the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies.

Metro. Life, 84 F.3d at 568 (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113–16, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987)). "These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Burger King*, 471 U.S. at 477, 105 S.Ct. 2174.

[54] There obviously are competing policy considerations at play here. In general, "'great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.'" *Asahi Metal Indus.*, 480 U.S. at 115, 107 S.Ct. 1026 (quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 404, 85 S.Ct. 528, 13 L.Ed.2d 365 (1965) (Harlan, J., dissenting)). "[T]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Id.* at 114, 107 S.Ct. 1026. On the other hand, "[t]here is some merit ... to the plaintiffs' argument that no foreign terrorist today can fairly assert a lack of 'fair warning' that it could be 'haled into court' in [this forum.]" *Biton v. Palestinian Interim Self-Government*, 310 F.Supp.2d 172, 178 (D.D.C.2004).

C. Jurisdictional Discovery

[55, 56] Plaintiffs urge the Court to deny Defendants' motions and order jurisdictional discovery. In evaluating jurisdictional motions, district courts enjoy broad discretion in deciding whether to order discovery. *See, e.g., APWU v. Potter*, 343 F.3d 619, 627 (2d Cir.2003) (noting a court may "devis[e] the procedures [to] ferret out the facts pertinent to jurisdiction"); *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir.1981) (noting a court has considerable procedural leeway in deciding whether discovery would assist resolution of motion to dismiss for lack of personal jurisdiction); *Lehigh Valley Indus. v. Birenbaum*, 527 F.2d 87, 93–94 (2d Cir.1975) (finding no abuse of discretion in denying discovery where the complaint failed to plead sufficient facts to establish

34. At oral argument, Plaintiffs focused on specific jurisdiction, *see* Oct. 12, 2004 Transcript at 44, but Plaintiffs include general jurisdiction arguments in many of their opposition briefs, *see, e.g.*, Ashton Opp. to Prince Mohamed at 22–24; Burnett Opp. to Aljomaih at 11. The Court considers all arguments.

jurisdiction). "If a plaintiff has identified a genuine issue of jurisdictional fact, jurisdictional discovery is appropriate even in the absence of a prima facie showing as to the existence of jurisdiction." *Daventree*, 349 F.Supp.2d 736 at 761, 2004 WL 2997881, at *20 (citing *In re Magnetic Audiotape*, 334 F.3d at 207–08). Courts are not obligated to subject a foreign defendant to discovery, however, where the allegations of jurisdictional facts, construed in plaintiffs' favor, fail to state a basis for the exercise of jurisdiction or where discovery would not uncover sufficient facts to sustain jurisdiction. *Id.* (citing *Jazini*, 148 F.3d at 183–85 (granting motion to dismiss and denying jurisdictional discovery where complaint was described as "sparse" and "conclusory")); *see also Cornell v. Assicurazioni Generali S.p.A., Consolidated*, Nos. 97 Civ. 2262, 98 Civ. 9186(MBM), 2000 WL 284222, at *2 (S.D.N.Y. Mar. 16, 2000) (granting motion to dismiss and denying request for jurisdictional discovery where the complaint stated, without any supporting facts, that the defendant "participates in a 'multinational insurance arrangement' present in the State of New York"); *In re Ski Train Fire in Kaprun, Austria*, 230 F.Supp.2d at 410–413 (granting motion to dismiss and denying jurisdictional discovery where complaint only contained conclusory allegations).

D. Application of Plaintiffs' Theories to Moving Defendants

1. Prince Sultan

The Court outlined the allegations against Prince Sultan in Part I.B.1. With respect to Prince Sultan's contacts with the United States, Plaintiffs allege that "Saudi Royal family members own substantial assets in the United States of America, and do substantial business in the United States of America, the profits of which in part, are used to fund international terrorist acts, including those which led to the murderous attacks of September 11, 2001." *See Ashton* Complaint ¶ 296. There is no indication of whether these unspecified members of the Royal family include Prince Sultan. Most Plaintiffs also claim Prince Sultan is the ex-officio Chairman of the Board of Saudi Arabia Airlines, "which does business in the United States and internationally." *Burnett* Complaint ¶ 340; *Ashton* Complaint ¶ 253; *Barrera* Complaint ¶ 255; *Salvo* Complaint ¶ 245; *Tremsky* Complaint ¶ 180. The *Federal* Plaintiffs do not make a similar allegation.

[57] To the extent these allegations are an attempt to establish general jurisdiction over Prince Sultan, they are insufficient. *See In re Baan Co. Sec. Litig.*, 245 F.Supp.2d 117, 130 (D.D.C.2003) (refusing to hold that control status in foreign corporation with United States office is sufficient for personal jurisdiction over individual); *Cornell*, 2000 WL 284222, at *2 (granting motion to dismiss where complaint contained one conclusory statement regarding jurisdiction); *Family Internet, Inc. v. Cybernex, Inc.*, No. 98 Civ. 0637(RWS), 1999 WL 796177, at *4 (S.D.N.Y. Oct. 6, 1999) (holding that personal jurisdiction must be individually established over corporate officers even when the court has personal jurisdiction over the corporation itself).

[58] Proceeding under the purposefully directed activities theory of personal jurisdiction, Plaintiffs argue that Prince Sultan knew or should have known the organizations to which he donated were funneling money to al Qaeda and that al Qaeda's primary target was the United States. Consol. Plaintiffs' Opp. at 23. Prince Sultan argues that his alleged actions cannot satisfy the minimum contacts requirement since the Second Circuit's recent description of *Calder* requires "primary participa[tion] in intentional wrongdoing." *See*

In re Magnetic Audiotape, 334 F.3d at 208.

Judge Robertson dismissed without prejudice the claims against Prince Sultan in his personal capacity for lack of personal jurisdiction. *Burnett II*, 292 F.Supp.2d at 21–22. He rejected Plaintiffs' argument that Prince Sultan had purposefully directed his alleged activities at the United States. *Id.* at 22–23. Judge Robertson found that the complaint's claims that Prince Sultan donated money to foundations that allegedly funded al Qaeda "stop[ ] well short of alleging Prince Sultan's actions were 'expressly aimed' or 'purposefully directed' at the United States." *Id.* at 23 (citing *Burger King* and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774–75, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984)). Judge Robertson also denied Plaintiffs' request for discovery because they did not provide an "outline of how their showing of minimum contacts might be enhanced by jurisdictional discovery." *Id.* at 22.

This Court's record, which Plaintiffs claim is more extensive than that before Judge Robertson, contains many examples of Osama bin Laden's and al Qaeda's public targeting of the United States. *See* Bierstein Aff. in Opp. to Prince Sultan's Motion to Dismiss, Exs. 1–24. The complaints also contain conclusory allegations that Prince Sultan aided and abetted terrorism. *See, e.g., Burnett* Complaint ¶ 363; *Federal* Complaint ¶¶ 429–31. But Plaintiffs do not offer any facts to lend support to their allegation that Prince Sultan purposefully directed his activities at this forum by donating to charities that he knew at the time supported international terrorism. *See* Exec. Order 13244 (designating certain branches of Al Haramain in 2002 and later). "[L]egal conclusions done up as factual allegations are not facts and cannot substitute for facts." *Cornell*, 2000 WL 284222, at *2 (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)). Plaintiffs have note provided an "outline of how their showing of minimum contacts might be enhanced by jurisdictional discovery." *Burnett II* 292 F.Supp.2d at 22. Accordingly, Prince Sultan's motions to dismiss the certain consolidated and *Federal* complaints for lack of personal jurisdiction over the claims concerning his personal acts are granted. Plaintiffs' request for jurisdictional discovery with respect to Prince Sultan is denied. *Daventree*, 349 F.Supp.2d 736, at 761, 2004 WL 2997881, at *20 (finding jurisdictional discovery is not necessary where the allegation of jurisdictional facts fails to state a basis for the exercise of personal jurisdiction).

2. Prince Turki

[59] The allegations against Prince Turki are outlined in Part I.B.2. Because the consolidated Plaintiffs do not allege any acts taken by Prince Turki in his personal capacity, the Court only considers the *Federal* Plaintiffs' claim that Prince Turki made personal donations to certain Saudi charities. *See Federal* Complaint ¶ 452. The *Federal* complaint does not make any specific jurisdictional allegations against Prince Turki. Rather, these Plaintiffs rely on *Calder, Rein, Daliberti, Pugh*, and the modified due process standard for mass torts to argue that the September 11 attacks were a foreseeable result of Prince Turki's alleged support of certain Saudi charities. *See* Federal Opp. to Prince Turki's Motion to Dismiss at 22–23.

The *Federal* Plaintiffs have not presented any specific facts from which this Court could infer Prince Turki's primary and personal involvement in, or support of, international terrorism and al Qaeda. Conclusory allegations that he donated money to charities, without specific factual allega-

tions that he knew they were funneling money to terrorists, do not suffice. *See Burnett II,* 292 F.Supp.2d at 23 (citing *Burger King* and *Keeton v. Hustler Magazine, Inc.,* 465 U.S. at 774–75, 104 S.Ct. 1473); *see also* Exec. Order 13244 (designating certain branches of Al Haramain and BIF in 2002). Accordingly, Prince Turki's motion to dismiss the *Federal* complaint for lack of personal jurisdiction is granted. Jurisdictional discovery is not appropriate with respect to Prince Turki because Plaintiffs have not identified any genuine issue of jurisdictional fact. *Daventree,* 349 F.Supp.2d 736, at 761, 2004 WL 2997881, at *20.

3. Prince Mohamed

The *Ashton* and *Federal* Plaintiffs allege that Prince Mohamed is or was the chairman or chief executive officer of three financial institutions in Saudi Arabia: Dar al Maal al Islami ("DMI"), Islamic Investment Company of the Gulf–Bahrain EC ("IICG"), and Faisal Islamic Bank–Sudan ("FIBS"), which are all shareholders of Defendant Al Shamal Islamic Bank.[35] *Ashton* Complaint ¶¶ 51, 54; *Federal* Complaint ¶¶ 307, 309, 473. They claim that Prince Mohamed knew or should have known that each of these financial institutions "acted as an aider and abettor and material sponsor of al Qaeda, Bin Laden, and international terrorism." *Ashton* Complaint ¶ 276; *Federal* Complaint ¶ 472 (alleging Prince Mohamed "has long provided material support and resources to al Qaeda"). The *Ashton* Plaintiffs claim that Prince Mohamed is "heavily involved in the sponsorship of terror through Faisal Islamic Bank–Sudan," since at some point al Qaeda allegedly had an account there. *Ashton* Complaint ¶¶ 65, 66, 255, 274; *see also* Ashton Opp. to Prince Mohamed's Motion to Dismiss at 25 (arguing that al Qaeda operative Jamal Ahmed Al Fadl used an account at Al Shamal Islamic Bank to transfer $250,000 for Osama bin Laden). These Plaintiffs also claim that Prince Mohamed has financial ties with alleged al Qaeda financier Muhammed Zouaydi. *Ashton* Complaint ¶ 258. The *Federal* Plaintiffs claim that Prince Mohamed made personal contributions to Saudi-based charities that he knew or should have known sponsored the terrorist activities of al Qaeda. These charities include IIRO, MWL, WAMY, BIF, the Saudi High Commission, SJRC, and Al Haramain. *Federal* Complaint ¶¶ 475–76

The *Ashton* complaint contains an unspecific allegation regarding the Saudi Royal family's ownership of property in the United States. *Ashton* Complaint ¶ 296. The *Ashton* Plaintiffs argue that general jurisdiction is appropriate because Prince Mohamed attended college and business school in the United States, gave two interviews in a New York apartment in 1978, gave a speech at Harvard in 1999, and made investments in American businesses through the banks he chairs in 2001. Ashton Opp. to Prince Mohamed Motion to Dismiss at 22–23. Plaintiffs assert jurisdictional discovery is likely to expose further contacts between Prince Mohamed and the United States.

If general jurisdiction is not established through Prince Mohamed's contacts with the United States, the *Ashton* and *Federal* Plaintiffs claim that jurisdiction exists under either the New York long-arm conspiracy theory or the purposefully directed activities theory. Ashton Opp. to Prince Mohamed Motion to Dismiss at 17–22; Federal Opp. to Prince Mohamed Motion to Dismiss at 6–12. Specifically, the *Ash-*

35. Osama bin Laden allegedly capitalized Al Shamal Islamic Bank with $50 million. *Burnett* Complaint ¶ 70. Several al Qaeda operatives, including Osama bin Laden, held accounts there. *Id.* ¶ 79.

ton Plaintiffs bolster their arguments for personal jurisdiction by citing to paragraphs in the complaint in support of each of the requirements for conspiracy. *See Chrysler Capital Corp.*, 778 F.Supp. at 1268–69 (outlining cause of action for conspiracy).

Plaintiffs claim that Prince Mohamed and al Qaeda agreed to injure the United States through acts of international terrorism. *Ashton* Complaint ¶¶ 5, 23 (all defendants are co-conspirators), 51, 105–08 (February 1993 World Trade Center bombing), 120 (February 1998 fatwa), 130–36 (1998 embassy bombings), 152–55 (U.S.S. Cole attack), 188, 255, 274–76, 580 (September 11, 2001 attacks); *see also Federal* Complaint ¶¶ 66, 72–74 (listing defendants who have "aided and abetted, conspired with, and provided material support and resources to, defendant al Qaeda and/or affiliated FTOs, associations, organizations or persons."). Next they claim the September 11 attacks were perpetrated in furtherance of that common scheme. *Ashton* Complaint ¶¶ 23, 188, 610. According to Plaintiffs, Prince Mohamed participated in the conspiracy by providing funding, financial support, and banking services through FIBS. *Id.* ¶¶ 48–54, 63–66, 255, 274–276, 387, 580, 582. Specifically, Plaintiffs claim:

- On October 17, 1983, Prince Mohamed became CEO of DMI. Under Prince Mohamed's chairmanship, DMI developed banking, investment and insurance activities in approximately twenty offices across the world. DMI was founded in 1981 to foster the spread of Islamic banking across the Muslim world and its Board of Directors included Haydar Mohamed bin Laden, a half-brother of Osama bin Laden. *Id.* ¶ 274.
- Faisal Islamic Bank Sudan was one of the five main founders of Al Shamal Islamic Bank .... Al Shamal Islamic Bank is an instrumental bank in bin Laden's financial support network. Bin Laden used Al Shamal Bank for the funding of his al Qaeda network leading up to the 1998 United States embassy bombings in Africa. Defendant Faisal Islamic Bank was implicated during Al Fadl's May 2001 United States trial testimony regarding the bombings as holding and managing bank accounts for al Qaeda operatives. *Id.* ¶¶ 274–75.
- As the head of DMI, Prince Mohamed knew or should have known of these and other activities and acted as an aider and abettor and material sponsor of al Qaeda, bin Laden, and international terrorism. *Id.* ¶ 276.
- U.S. designated terrorists Wa'el Julaidan and Yassin Kadi had accounts in a DMI subsidiary. Ashton Opp. at 25.

Finally, Plaintiffs allege the that attacks in question caused many deaths, a fact that no one disputes. *Ashton* Complaint ¶¶ 23, 610.

In response, Prince Mohamed argues that Plaintiffs have failed to demonstrate that he is "present" in the United States for general personal jurisdiction purposes. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 411–12, 416–18, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 998 (2d Cir.1975) (buying and selling American securities is insufficient to establish that defendant was "doing business" in the United States). Prince Mohamed submits that some of the contacts on which Plaintiffs rely are too far removed in time from September 2001 to be considered by the Court. *See Metro. Life*, 84 F.3d at 569 (holding courts should examine a defendant's contacts with the forum for a reasonable period prior to the date on which the lawsuit was filed, and finding that six

years was reasonable). Prince Mohamed correctly submits that his position as an officer of DMI, IICG, and FIBS would not be a basis for jurisdiction over him even if the Court had personal jurisdiction over these entities. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984) ("Each defendant's contacts with the forum State must be assessed individually."). Finally, Prince Mohamed argues that the conclusory allegation that he participated in a terrorist conspiracy, without specific facts, is insufficient to create personal jurisdiction over him.

[60] The Court agrees that Plaintiffs have not presented a prima facie case of general jurisdiction over Prince Mohamed. In the ten years before the attacks, Prince Mohamed's contacts with the United States consist of one speech and a handful of investments in the United States through the banks with which he is affiliated. These contacts are not sufficiently "systematic and continuous" to maintain general jurisdiction over a defendant in this action.[36] *See Helicopteros*, 466 U.S. at 416, 104 S.Ct. 1868 (holding that purchasing in forum, sending personnel for training in forum, and negotiating a contract in forum were not sufficient to establish general jurisdiction).

[61, 62] Plaintiffs have alleged that DMI and FIBS might have been involved in the financing of terrorism. *See, e.g., Ashton* Complaint ¶¶ 274–75; Ashton Opp. at 25. Even assuming that the Court has personal jurisdiction over these entities, "[t]he mere fact that a corporation is subject to jurisdiction ... does not mean that individual officer may be hauled before New York courts without any showing that the individuals themselves maintained a presence or conducted business in New York." *Family Internet*, 1999 WL 796177, at *4. Plaintiffs have not alleged that Prince Mohamed had any knowledge or involvement in any al Qaeda accounts at any of the banks he chaired. FIBS' relationship with Al Shamal Islamic Bank, which purportedly knowingly opened accounts for al Qaeda operatives, including Osama bin Laden, is too remote in time and proximity to implicate Prince Mohamed. To make a prima facie case of personal jurisdiction, Plaintiffs must either allege personal acts by Prince Mohamed by which he purposefully directed his activities at the United States by supporting Osama bin Laden, al Qaeda, or their terrorist agenda, or demonstrate that the acts of the banks he chaired can be imputed to him. Plaintiffs have not met their burden. Thus, Prince Mohamed's motions to dismiss the *Ashton* and *Federal* complaints as against him for lack of personal jurisdiction are granted.

4. Estate of Mohammad Abdullah Aljomaih

On May 2, 2003 by Second Addition and Removal of Defendants Pursuant to Case Management Order No. 1 imposed by Judge Robertson, the *Burnett* Plaintiffs added a defendant "Mohammed Bin Abdullah Al–Jomaith." To date, no specific allegations have been added to the complaint with respect to Mr. Aljomaih.

In anticipation of what the claims against him might be, before his death Mr. Aljomaih prepared a declaration in support of his motion to dismiss. He was born in Saudi Arabia in 1915 and lived in Riyadh for most of his life. Aljomaih Decl. ¶ 3. He and his family began a company in the 1940s that now supplies automobiles, soft drinks, construction equipment, and other

36. There is no allegation that Prince Mohamed's investments in the United States are related to any alleged conspiracy or to al Qaeda's activities.

goods and services to large portions of Saudi Arabia. *Id.* ¶ 4. In the past ten years he visited the United States three times for medical reasons. *Id.* ¶¶ 5–6. Prior to these medical visits, he took a short trip to New York City in 1964. *Id.* ¶ 7. He owned no property, held no bank accounts, and conducted no business in this country. *Id.* ¶ 10.

Mr. Aljomaih's estate argues that there were problems with his service. He was served pursuant to Judge Robertson's March 25, 2003 approving service by publication. Under that order, Plaintiffs published a list of defendants in two publications, *The International Herald Tribune* and *Al Quds Al Arabia.* The notice in *The International Herald Tribune* contained Mr. Aljomaih's name in English, a language he could not read. *Id.* ¶ 11. *Al Quds Al Arabi* is published in Arabic, but is not circulated in Saudi Arabia and the list did not include Mr. Aljomaih's name. Even if service was proper, however, the estate of Mr. Aljomaih claims the Court does not have personal jurisdiction over it.

Plaintiffs submit that Mr. Aljomaih is implicated by the "Golden Chain." Plaintiffs' Opp. at 9. The "Golden Chain" is a group of documents that was discovered by Bosnian authorities searching the offices of charity Defendant BIF in March 2002. Plaintiffs claim the "Golden Chain" contains a list of early direct donors to al Qaeda. Plaintiffs' Opp. at 9; *see also* Bierstein Aff. in Opp. to Al–Husani Motion to Dismiss, Ex. 2 ("Golden Chain" document). It includes the entry "Al–Jumaih. Jeddah (S.A.)." Plaintiffs do not dispute that "for more than sixty years [Mr. Aljomaih] lived in Rihadh," not Jeddah, Aljomaih Decl. ¶ 3, yet they insist the document identifies him as a direct donor to al Qaeda. Additionally, Plaintiffs claim that Mr. Aljomaih's company donated money to charity Defendant IIRO. Plaintiffs assert there are sufficient allegations against Mr. Aljomaih in the form of general allegations against all Defendants to put him on notice of the claims against him. They claim that jurisdiction over Mr. Aljomaih's estate is proper because he "purposefully directed" his activities at the United States by supporting al Qaeda. Plaintiffs also submit that Mr. Aljomaih's company does business with General Motors and Shell Corporation and that, therefore, he must have had contacts with the United States. *See* Opp. at 11; Statement of Jamie L. Paye attached to Plaintiffs' Opp.

[63] The Court finds the Plaintiffs have not established a prima facie case of jurisdiction over Mr. Aljomaih to defeat his motion or warrant jurisdictional discovery. Their theory of jurisdiction rests almost entirely on a document with serious foundational flaws. Even assuming, as the Court must, that the "Golden Chain" refers to Mr. Aljomaih, with no indication of who wrote the list, when it was written, or for what purpose, the Court cannot make the logical leap that the document is a list of early al Qaeda supporters. Mr. Aljomaih's motion to dismiss the *Burnett* complaint for lack of personal jurisdiction is accordingly granted.

5. Sheikh Hamad Al–Husani

The posture of the *Burnett* Plaintiffs' case against Sheikh Hamad Al–Husani is similar to that against Mr. Aljomaih. Mr. Al–Husani was also added to a list of defendants to be served by publication and the complaint contains no specific allegations against him. Al–Husani Decl. ¶ 10. He is a watch retailer residing in Saudi Arabia. *Id.* ¶¶ 3–4, 7. Mr. Al–Husani has never visited the United States, owns no real property here, holds no bank accounts or investments in the United States, and does not engage in transactions with any businesses in the United States. *Id.* ¶¶ 3,

5–7. He has never supported any person or organization that he has known to participate in any terrorist attacks. *Id.* ¶ 9. Mr. Al–Husani submits that Plaintiffs cannot cure the lack of allegations in the complaint in its motion papers. *Wright v. Ernst & Young, LLP,* 152 F.3d 169, 178 (2d Cir.1998) (explaining a party is not permitted to amend its complaint through allegations made in motion papers).

Mr. Al–Husani also claims that he was not properly served because *The International Herald Tribune* has a circulation of only 199 in Saudi Arabia and is published in English, and *Al Quds Al Arabia* is a London-based paper banned in the Kingdom. Even if service was proper, however, Mr. Al–Husani submits this Court does not have personal jurisdiction over him.

The *Burnett* Plaintiffs claim that Mr. Al–Husani is also implicated by the "Golden Chain," and thus an early supporter of al Qaeda. Plaintiffs' Opp. to Al–Husani Motion to Dismiss at 10; Bierstein Aff. at Ex. 2 (document listing "Hamad Al Husaini," without indicating when list was written, by whom, or for what purpose). The Plaintiffs place great weight on the United States' inclusion of the "Golden Chain" in its proffer of evidence in *United States v. Arnaout,* the government's case against an executive of Defendant charity BIF. *See* Bierstein Aff. at Ex. 1 (proffer). The court presiding over that case, however, ruled that the document was inadmissible hearsay. *United States v. Arnaout,* No. 02 Cr. 892, 2003 WL 255226, at *1–2 (N.D.Ill. Feb. 4, 2003). Nevertheless, by supporting al Qaeda, Plaintiffs assert Mr. Al–Husani purposefully directed his activities toward the United States, making the exercise of personal jurisdiction appropriate. *See, e.g.* Bierstein Aff. Exs. 9–15 (detailing al Qaeda's hatred for and actions against the United States). Additionally, Plaintiffs claim that one of Mr. Al–Husani's companies is a supporter of Al–Waqf al-Islami Foundation, a Dutch entity whose seminars "have drilled extremist messages into the heads of thousands of young Muslims." "Radical Foundation: In 'Law' Seminars, A Saudi Group Spreads Extremism," *Wall St. J.,* Apr. 15, 2003, at Bierstein Aff. Ex. 6.

[64] Plaintiffs have not established a prima facie showing of jurisdiction over Mr. Al–Husani to survive his motion to dismiss or warrant jurisdictional discovery. The "Golden Chain" does not say what the Plaintiffs argue it says. It is only a list of names found in a charity's office. It does not establish Mr. Aljomaih's involvement in a terrorist conspiracy culminating in the September 11 attacks and it does not demonstrate that he purposefully directed his activities at the United States. Accordingly, Mr. Al–Husani's motion to dismiss the *Burnett* complaint against him is granted.

6. NCB

The Court outlined the *Ashton* and *Burnett* Plaintiffs' claims against NCB in Part I.B.4. For purposes of the personal jurisdiction analysis, the Court will assume at this point that the FSIA does not provide for subject matter and personal jurisdiction over NCB. Accordingly, the Plaintiffs will have to make a prima facie showing to survive NCB's motion to dismiss. In that vein, Plaintiffs argue that NCB purposefully directed its activities at the United States and participated in a conspiracy that culminated in the attacks of September 11.

Plaintiffs submit NCB has many contacts with the United States, including a wholly-owned subsidiary in New York City through which it operates an international banking business. *See, e.g.,* Aff. of John Fawcett in Support of Ashton Plaintiffs' Opp. to NCB's Motion to Dismiss (hereinafter "Fawcett Aff.") ¶ 3, Exs. 2 & 3. NCB

has been a party to lawsuits in the Southern District of New York, both as a plaintiff and defendant. Fawcett Aff. ¶ 7. *The Muslim World League Journal*, a monthly publication distributed in American mosques, ran solicitations from 1998 to 2001 for the Islamic Solidarity Fund & Waqf for the Organization of the Islamic Conference and the Khair Funds of the Muslim World League that provided NCB account numbers to which donors could contribute directly. *Id.* ¶ 8, Ex. 5. Plaintiffs request jurisdictional discovery to explore further contacts.

NCB argues that none of Plaintiffs' submissions satisfy the constitutionally required showing of minimum contacts. NCB closed its New York City branch office in 1992. Decl. of Jorge Juco ("Juco Decl.") ¶ 5, at Berger Aff. in Support of NCB's Motion to Dismiss *Ashton* and *Burnett*, Ex. 5. NCB's second-tier subsidiary, SNCB Securities Inc., dissolved in February 2001. *Id.* (citing Ex. A of Juco Decl., the certified copy of the Certificate of Dissolution); *see also Schenker v. Assicurazioni Generali, S.P.A.*, No. 98 Civ. 9186(MBM), 2002 WL 1560788, at * 4 (S.D.N.Y. July 15, 2002) (finding no personal jurisdiction over parent corporation where New York subsidiary was sold two months prior to commencement of action). NCB submits its involvement in lawsuits is equally unavailing because both were terminated prior to the filing of this action. *See* docket *Logan Feed v. Nat'l Commercial Bank*, No. 92 Civ. (S.D.N.Y.) (NCB terminated July 24, 1995); docket *Nat'l Commercial Bank v. Morgan Stanley Asset Mgmt., Inc.*, No. 94 Civ. 3167 (S.D.N.Y.) (closed Feb. 17, 1998). It contends that its consent to personal jurisdiction in one case does not open the door to personal jurisdiction in future cases. *See Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 50 n. 5 (2d Cir.1991); *Andros Compania Maritima, S.A. v. Intertanker Ltd.*, 714 F.Supp. 669, 675 (S.D.N.Y.1989) (holding lawsuits in the forum do not establish general personal jurisdiction). NCB argues that there is no indication it placed the advertisements in *The Muslim World League Journal*, or that any donations were deposited into NCB accounts.

In arguing its absence of contacts with the United States, NCB reiterates that it is not domiciled, organized, or maintaining an office in New York. Juco Decl. ¶ 3. It is not registered or licensed to do business in the United States and has no property in the United States. *Id.* ¶ 8. Shares of NCB stock are not sold in the United States, there are no NCB employees or telephone numbers in the United States, and the company does not advertise or solicit business in the United States. *Id.* ¶ 11. Its website is accessible from United States, but only NCB account holders may access the inter-active services. *Id.* The Saudi Arabian Monetary Agency requires that NCB's account holders be Saudi citizens or residents, Saudi government entities, or business or charity entities with lawful status in Saudi Arabia. Juco Decl. ¶ 10.

NCB claims the rare contacts it does have with the United States do not satisfy the requirements of due process. Although it maintains correspondent banking relationships with U.S. commercial banks, Juco Decl. ¶ 12, NCB argues such relationships are insufficient to establish personal jurisdiction over NCB. *Semi Conductor Materials, Inc. v. Citibank Int'l PLC*, 969 F.Supp. 243, 244 (S.D.N.Y.1997) (holding foreign bank's correspondent banking relationship with New York bank is not sufficient for personal jurisdiction); *Casio Computer Co. v. Sayo*, No. 98 Civ. 3772(WK), 2000 WL 1877516, at *26 (S.D.N.Y. Oct. 13, 2000) (holding defendant bank's wire transfers to U.S. bank accounts does not create minimum contacts); *Leema Enters., Inc. v. Willi*, 575 F.Supp.

1533, 1537 (S.D.N.Y.1983) (holding correspondent banking relationships insufficient to create general personal jurisdiction). NCB offers its customers the opportunity to open accounts directly with United States-based securities broker-dealers, but NCB does not act as a broker-dealer for securities sold in the United States and is not so licensed. Juco Decl. ¶ 14; *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 998 (2d Cir.1975) (finding Canadian securities broker not "doing business" in New York when it arranges for its Canadian customers to buy and sell U.S. securities through U.S. broker). In 2002, less than 2% of the securities NCB traded for its own account were issued by U.S. entities. Juco Decl. ¶ 15; *Schenker*, 2002 WL 1560788, at *3–5 (finding that a single bank account in the United States, constituting small fraction of defendant's total assets, is insufficient to form the basis for personal jurisdiction).

[65] Taken individually, NCB's contacts with the United States would not satisfy due process requirements. However, when they are examined as a whole—the presence of a branch office until 1992, a subsidiary until 2001, taking advantage of the privilege of its presence in New York by instigating a lawsuit in this forum, advertisements in U.S. publications—the Court finds that they may, with the help of limited jurisdictional discovery, comport with due process. NCB's motion to dismiss is therefore denied without prejudice.

7. Abdulrahman bin Mahfouz

Abdulrahman bin Mahfouz is a Defendant in the *Burnett* action. He is the son of Defendant Khalid bin Mahfouz and a director of the Defendant charity Blessed Relief Society, also known as Muwaffaq. *Burnett* Complaint ¶¶ 331; 445. Blessed Relief is a branch of the Human Concern International Society, which Osama bin Laden identified as a supporter in 1995. *Id.* ¶ 333. He is a shareholder and the CEO of former Defendant Nimir, LLC, also known as Nimir Petroleum Ltd. *Id.* ¶ 443.[37] Finally, Plaintiffs claim that Mr. bin Mahfouz was a member of the board and Vice Chairman of the Executive Management Committee of Defendant National Commercial Bank. *Id.* ¶ 445.

Plaintiffs base their personal jurisdiction arguments on their claim that Mr. bin Mahfouz was a participant in the conspiracy of terror that purposefully directed its conduct at the United States and included the September 11 hijackers. Plaintiffs also claim that he has business interests in the United States. Specifically he is a shareholder in U.S.-based companies, and his company, Al Murjan, allegedly has dealings with the American phone company Hughes Technologies, Inc.

Mr. bin Mahfouz disputes the manner in which he was served. His name appeared in Plaintiffs' notice by publication in *The International Herald*, which only has circulation of 199 in the entire Kingdom of Saudi Arabia, and *Al Quds al-Arabia*, which is banned in the Kingdom. He submits that he has no personal contacts with the United States and there is no basis for exercising personal jurisdiction over him.

[66] The *Burnett* complaint does not contain any specific actions by Mr. bin Mahfouz from which the Court could infer that he purposefully directed his activities at the United States. His affiliations with entities that are alleged to have U.S. contacts will not sustain jurisdiction. *Family Internet*, 1999 WL 796177, at *4. Finally, being a shareholder in a United States

37. The *Burnett* Plaintiffs voluntarily dismissed their claims against Nimir LLC. *See* Mem. in Supp. of Motion to Dismiss Ex. 1.

company is not sufficient to establish general personal jurisdiction over Mr. bin Mahfouz. *Bersch*, 519 F.2d at 998; *see also Schenker*, 2002 WL 1560788, at *3–5 (finding single bank account in United States constituting small fraction of defendant's total assets is not a sufficient basis for personal jurisdiction). Mr. bin Mahfouz's motion to dismiss the *Burnett* complaint as against him for lack of personal jurisdiction is accordingly granted.

8. Saudi Binladin Group, Tariq Binladin, Omar Binladin, and Bakr Binladin

The *Ashton* and *Burnett* complaints name the Saudi Binladin Group ("SBG") as a Defendant. The *Burnett* complaint also names Tariq Binladin, Omar Binladin, and Bakr Binladin, Osama's half-brothers, as Defendants. In both actions, these Defendants move to dismiss the complaint or for a more definite statement.

Based in Jeddah, Saudi Arabia, SBG is the successor to a construction company founded by Mohammed Binladin, the father of Osama bin Laden. *Ashton* Complaint ¶ 543; *Burnett* Complaint ¶ 311. It is now one of the largest engineering and construction companies in the Arab world and is managed by Osama bin Laden's half brothers, including defendants Bakr Binladin, who runs SBG, and Tariq Binladin, who holds a position on the board. *Ashton* Complaint ¶ 545; *Burnett* Complaint ¶ 313. Tariq Binladin allegedly had a prominent role at IIRO in 1990. *Ashton* Complaint ¶ 557; *Burnett* Complaint ¶ 326. Osama bin Laden purportedly used SBG to build an infrastructure in Afghanistan. *Ashton* Complaint ¶¶ 546, 547; *Burnett* Complaint ¶¶ 314–316. After the Soviets withdrew from Afghanistan in 1989, Osama bin Laden returned to work with SBG in Jeddah. *Ashton* Complaint ¶ 548; *Burnett* Complaint ¶ 317. SBG allegedly continued to support Osama bin Laden after he relocated to Sudan in 1991. *Ashton* Complaint ¶ 548; *Burnett* Complaint ¶ 317. For example, SBG, through two subsidiaries allegedly supported Osama bin Laden's participation in the construction of the Tahaddi road and Port Sudan Airport. *Ashton* Complaint ¶¶ 550; 552, 553; *Burnett* Complaint ¶¶ 319–322. Plaintiffs claim Osama bin Laden's name is still listed on SBG corporate records. *Ashton* Complaint ¶ 558; *Burnett* Complaint ¶ 329. Defendants dispute this and argue he was formally removed from SBG's ownership documents in June 1993. SBG's Mem. in Supp. of Motion to Dismiss Ashton Complaint at 2. Plaintiffs also claim that Osama bin Laden never "broke" with his family after he was exiled to Sudan and that SBG continued to provide him financial assistance and engineering support. *Ashton* Complaint ¶ 549; *Burnett* Complaint ¶ 318. Defendants also dispute this statement and argue that Bakr formally ostracized Osama from the family and the company in a February 1994 statement. SBG's Mem. in Supp. of Motion to Dismiss Ashton Complaint at 2.

SBG "sheltered and directly supported operatives of the al Qaeda terrorist organization." *Ashton* Complaint ¶ 555; *Burnett* Complaint ¶ 324. Mohammad Jamal Khalifa, allegedly a key al Qaeda operative, was taken in by a branch of SBG, the Mohammed Bin Laden Organization. *Ashton* Complaint ¶ 555; *Burnett* Complaint ¶ 324. The Mohammed Bin Laden Organization is allegedly a wholly-owned subsidiary of SBG and its board members include defendants Bakr, Tariq, and Omar Binladin. *Ashton* Complaint ¶ 556; *Burnett* Complaint ¶ 325. Khalifa listed the Mohammed Bin Laden Organization address on his visa application. *Ashton* Complaint ¶ 555; *Burnett* Complaint ¶ 324. Additionally, U.S.-designated terrorist Yassin Abdullah al-Kadi was allegedly introduced to

the Global Diamond Resource's Chairman by an executive of SBG. *Ashton* Complaint ¶ 459; *Burnett* Complaint ¶ 328.

Plaintiffs claim that SBG had an address in Rockville, Maryland until very recently. *Ashton* Complaint ¶ 545; *Burnett* Complaint ¶ 313. SBG claims the Rockville address was the headquarters of a separately incorporated company, SBG USA, which was formally dissolved in December 1999. *See* SBG Memorandum in Support of Motion to Dismiss Ashton Complaint at 7 & Ex. 2 (articles of dissolution); *see also Klinghoffer v. S.N.C. Achille Lauro,* 937 F.2d 44, 52 (2d Cir.1991) (personal jurisdiction contacts determined at time complaint is filed); *but see Metro. Life,* 84 F.3d at 569 (holding courts should examine a defendant's contacts with the forum for a reasonable period prior to year of lawsuit and finding six years was reasonable).

[67] The *Burnett* complaint does not contain any factual allegations against Tariq, Omar, or Bakr Binladin from which the Court could infer that they purposefully directed their activities at the United States, that they were members of a conspiracy pursuant to the New York long-arm statute, or that they have any general business contacts with the United States. Accordingly, the *Burnett* complaint against these three individuals is dismissed.

[68] Rather than permitting a 12(e) statement, the Court finds jurisdictional discovery is warranted to determine if SBG purposefully directed its activities at the United States. *See Asip v. Nielsen Media Research,* No. 03 Civ. 5866(SAS), 2004 WL 315269, at *2 (S.D.N.Y. Feb. 18, 2004) (noting the purpose of Rule 12(e) is to "strike at unintelligibility rather than want of detail and . . . allegations that are unclear due to lack of specificity are more appropriately clarified by discovery"). Specifically, although the complaints are not specific about when, at the very least, SBG provided construction support to Osama bin Laden. *Ashton* Complaint ¶¶ 550, 552–53; *Burnett* Complaint ¶¶ 319–22. A branch of SBG allegedly look in an al Qaeda operative who listed the SBG branch address on his visa application. *Ashton* Complaint ¶ 555; *Burnett* Complaint ¶ 324. It is alleged to have ties to U.S.-designated terrorist Yassin Abdullah Al–Kadi. *Ashton* Complaint ¶ 459; *Burnett* Complaint ¶ 328. At this stage, the Court must accept as true Plaintiffs' contentions that SBG still contains Osama bin Laden's name in its corporate documents. *Ashton* Complaint ¶ 558; *Burnett* Complaint ¶ 329. Additionally, although it would not satisfy the due process requisites on its own, SBG's presence in Maryland three years before the complaints were filed, also warrants some discovery. Accordingly, SBG's motion to dismiss the *Ashton* and *Burnett* complaints are denied without prejudice.

9. SAAR Network

The *Federal* Plaintiffs claim the SAAR Network is a network of "interrelated ostensible charities" that was established in the 1980s "to generate and surreptitiously transfer funds to terrorist organizations, including al-Qaeda." *Federal* Complaint ¶ 222. Several organizations within the SAAR Network, including SAAR Foundation, SAAR International, Safa Group, Mar–Jac Poultry, Mar–Jac Holdings, Inc., Safa Trust, Inc. and Aradi, Inc., were established, funded or closely affiliated with Defendant Suleiman Abdul Aziz al Rajhi. *Id.* at ¶ 223. By September 11, 2001, there were allegedly over one hundred entities in this network, "including the U.S. branches of MWL, IIRO and WAMY, [and the SAAR Network Defendants moving to dismiss here,] African Muslim Agency, Grove Corporate, Inc., Heritage Education Trust, International Institute of Islamic Thought,

Mar–Jac Investment, Inc., Mena Corporation, Reston Investment, Inc., Sterling Charitable Gift Fund, Sterling Management Group, Inc., Success Foundation, and York Foundation." *Id.* ¶ 224. Allegedly, many of the entities are related by common management, few of them maintained a physical presence at their purported place of business, and they all "have long acted as fully integrated components of al Qaeda's logistical and financial support infrastructure." *Id.* ¶¶ 225, 226.

Plaintiffs argue the Court has personal jurisdiction over the SAAR Network because it participated in the conspiracy that resulted in catastrophic effects in this district. After an ongoing investigation in the Eastern District of Virginia, federal authorities raided the offices of several of these Defendants in Herndon, Virginia in March 2002. *Id.* ¶ 227. The investigation has allegedly revealed that SAAR Network funds have been transferred to designated terrorists and al Qaeda operatives Youssef Nada and Ahmed Idris Nasreddin. *Id.* ¶ 228; *see* Exec. Order No. 13224 (designating individuals as terrorists). Additionally, Plaintiffs claim that the investigation has revealed that SAAR Network entities have engaged in transactions with Bait Ul-mal, Inc. (BMI), which has transferred funds to terrorist organizations including al Qaeda, and materially supported the 1998 embassy bombings in Africa. *Federal* Complaint ¶¶ 229–230.

[69] At this stage, the Court must accept as true Plaintiffs' allegations concerning the relationships of the SAAR Network. *Id.* ¶¶ 222, 226. Defendants correctly argue, however, that Defendants have provided scant basis for linking these entities under the SAAR Network title. Certain of these groups may be subject to personal jurisdiction in light of Plaintiffs' allegation that they purposefully directing its activities at the United States by transferring money to designated terrorists Youssef Nada and Ahmed Idris Nasreddin, particularly if they intended the money to support terrorism. *Id.* ¶ 228. Additionally, general jurisdiction could be appropriate for the SAAR Network entities having offices in Virginia. *Id.* ¶ 227. Accordingly, the SAAR Network's motion to dismiss is denied without prejudice. The parties are to engage in jurisdictional discovery to determine which of the Network's entities have a presence in Virginia and which entities transferred money to Nada and Nasreddin.

10. Adel A.J. Batterjee

The *Burnett* Plaintiffs claim that Defendant Adel A.J. Batterjee is an associate of Osama bin Laden. *Burnett* Complaint ¶ 181. On December 21, 2004, the U.S. Department of Treasury designated Mr. Batterjee as a Specially Designated Global Terrorist. *See* Dec. 23, 2004 Bierstein letter to Court; Exec. Order No. 13224. Mr. Batterjee is the chairman of Al Shamal Islamic Bank, "an instrumental bank in Osama bin Laden's financial support network." *Burnett* Complaint ¶ 365. Mr. Batterjee is also chairman of al-Bir Saudi Organization, whose United States branch, Defendant BIF, is allegedly a "front for al Qaeda sponsorship." *Burnett* Complaint ¶¶ 75, 196, 199. BIF is also a designated terrorist organization. *See* Exec. Order No. 13224. The Saudi government closed Al–Bir in 1993 "at the same time it was closing other organizations for ties to terrorism." *Burnett* Complaint ¶ 183. Mr. Batterjee then allegedly moved the charity's headquarters to Chicago in the name of BIF. *Id.* ¶ 183. Mr. Batterjee is listed as one of BIF's three founders in its articles of incorporation filed in Illinois. *Id.* ¶ 183. Through an alias, Mr. Batterjee allegedly sent money to BIF's branches.

Id. ¶ 184; *see also* Decl. of Jodi Westbrook Flowers in Opp. to Batterjee Motion to Dismiss ("Flowers Decl.") Att. 5, p. 7 (BIF record showing $48,464 contribution by Abdel Abdul Jalil Batterjee). Mr. Batterjee allegedly transferred control of BIF to Defendant Enaam M. Arnaout, on September 15, 1997.[38] *Burnett* Complaint ¶ 183. In October 2001, Arnaout allegedly told Batterjee he was worried about being under scrutiny of the U.S. government and in January 2002, Batterjee requested that Aranout relocate his family to Saudi Arabia. *Id.* ¶¶ 217–218. Plaintiffs also claim that Mr. Batterjee's name is on a BIF list of wealthy Saudi Arabian sponsors of al Qaeda and Osama bin Laden. *Id.* ¶ 219.

Plaintiffs also claim that Defendant charity WAMY and BIF are closely connected and that Mr. Batterjee was the Secretary General of WAMY when he founded BIF in the United States. *Id.* ¶ 229; *see also* Flowers Decl. Att. 4, p. 3 (December 5, 1992 *New York Times* article quoting Adel A. Batterjee as the chairman of WAMY). In his capacity as Secretary General of WAMY, Mr. Batterjee allegedly commissioned a biography of Osama bin Laden and the origins of al Qaeda, which was jointly published by WAMY and BIF in 1991. *Burnett* Complaint ¶ 230.

With respect to his contacts with the United States, Plaintiffs claim that the documents filed in 1992 in conjunction with the establishment of BIF in Chicago state that Mr. Batterjee is a founder of BIF and that BIF's founders travel to the United States on a regular basis. *See* Flowers Decl. Att. 2, pp. 2–3. In 1993 BIF filed an application to conduct business in Florida and listed Mr. Batterjee as a director with an address in Florida. *See id.* at Att. 3, p. 4. BIF's authorization to do business in Florida was revoked on August 26, 1994. *Id.* at p. 1.

Mr. Batterjee disputes the claims against him in a declaration filed in conjunction with his motion to dismiss. Batterjee Decl. ¶ 8. He states he was born in Saudi Arabia, attended college in the United States in the 1960s, and returned to Saudi Arabia. *Id.* ¶¶ 3, 5. He claims he was last in the United States in June 2000 for personal reasons. *Id.* ¶ 5. He denies owning any real property, bank accounts, or investments in the United States. *Id.* ¶ 6. With respect to the allegations contained in the complaint, Mr. Batterjee claims BIF was never a branch of Al Bir or vice versa. *Id.* ¶ 9. He claims he never sent money to BIF in all of its history. *Id.* He states he transferred away all control of BIF in 1993. *Id.* He claims he never served as an executive of WAMY, never wrote a biography of Osama bin Laden, and denies having any knowledge of Osama bin Laden's or al Qaeda's activities other than what is widely published in the press. *Id.* ¶¶ 9, 10.

Mr. Batterjee also disputes the manner in which he was served. Plaintiffs reasoned that *Al-Quds Al-Arabia* had published Osama bin Laden's fatwas in the past and could, therefore, reach his supporters regardless of their location. Further, *The International Herald Tribune* is

38. Mr. Arnaout was "criminally indicted for his role in the September 11, 2001 attacks." *Burnett* Complaint ¶ 199. But in its "written plea agreement, the government agreed to dismiss sensational and highly publicized charges of providing material support to terrorists and terrorist organizations." *United States v. Arnaout,* 282 F.Supp.2d 838, 843 (N.D.Ill.2003). The *Burnett* Plaintiffs allege Mr. Arnaout and Osama bin Laden have ties. For example, law enforcement officials in Bosnia–Herzegovina raided BIF's offices in March 2002 and allegedly recovered documents establishing direct communications between Mr. Arnaout and Osama bin Laden in the late 1980s and early 1990s. *Burnett* Complaint ¶¶ 188, 196, 199.

available to the world community. Additionally, Plaintiffs submit that these cases have been widely reported in the Arabic media and the complaints have been available on numerous websites for over two years. In light of these considerations and Judge Robertson's March 23, 2003 order approving service by publication for Defendants including Mr. Batterjee, the Court denies Mr. Batterjee's motion to quash service.

[70] The Court finds the *Burnett* Plaintiffs made a prima facie showing of personal jurisdiction over Mr. Batterjee. While perhaps not dispositive on its own, Mr. Batterjee's designation as a terrorist lends substantial weight to Plaintiffs' claims that he purposefully directed his activities at the United States and that the exercise of personal jurisdiction over him comports with due process. *See Biton,* 310 F.Supp.2d at 178. Mr. Batterjee purportedly commissioned a book about al Qaeda and Osama bin Laden. He is the chairman of Al Shamal Islamic Bank, a bank with admitted and substantial ties to Osama bin Laden. *Burnett* Complaint ¶¶ 70, 79. Additionally, he is involved in the United States operations of designated terrorist, BIF. In the ten years leading up to the commencement of this action, Mr. Batterjee has had contacts with the United States that could be related to the terrorist attacks inasmuch as BIF participated in those attacks. Specifically, Mr. Batterjee traveled to Chicago for BIF and had an address in Florida for BIF. Accordingly, Mr. Batterjee's motion to dismiss the *Burnett* complaint for lack of personal jurisdiction is denied.

III. Failure to State a Claim

In considering Defendants' motions to dismiss for failure to state a claim under Rule 12(b)(6), the Court must "accept all of Plaintiffs' factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the Plaintiffs." *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.,* 191 F.3d 198, 202 (2d Cir.1999). Dismissal is not appropriate unless it appears beyond doubt, "even when the complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief." *Id.; Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Federal Rule of Civil Procedure 8(a) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). The Supreme Court reinforced these liberal pleading standards in *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (observing the "short and plain statement" required by Rule 8 "must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests' ") (quoting *Conley,* 355 U.S. at 47, 78 S.Ct. 99). When presented with a 12(b)(6) motion, the district court may not consider matters outside of the pleadings without converting the motion into a motion for summary judgment. *Courtenay Communications Corp. v. Hall,* 334 F.3d 210, 213 (2d Cir.2003); *Friedl v. City of New York,* 210 F.3d 79, 83–84 (2d Cir.2000).

A. Elements of Claims

[71] Plaintiffs claim that each Defendant provided material support to the al Qaeda terrorists who perpetrated the attacks on September 11, 2001. Under the ATA, material support includes money, financial services, lodging, training, safehouses, and false documentation or identification. 18 U.S.C. §§ 2339A(b), 2339B(g). Assuming such support is alleged, Plaintiffs will have to present a sufficient causal connection between that support and the injuries suffered by Plaintiffs. *See Bur-*

nett I, 274 F.Supp.2d at 104. Proximate cause will support this connection. *See First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 769 (2d Cir.1994) ("Central to the notion of proximate cause is the idea that a person is not liable to all those who may have been injured by his conduct, but only to those with respect to whom his acts were a substantial factor in the sequence of responsible causation, and whose injury was reasonably foreseeable or anticipated as a natural consequence."). In light of al Qaeda's public acknowledgments of its war against the United States, the September 11 attacks may be the natural and probable consequence of knowingly and intentionally providing material support to al Qaeda. *Burnett I*, 274 F.Supp.2d at 104.

[72] Plaintiffs rely on theories of concerted action liability—conspiracy and aiding and abetting—in support of this causal link. "Concerted action liability under New York law is based on the principle that '[a]ll those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer . . . are equally liable with him.'" *Pittman*, 149 F.3d at 122 (quoting *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 580, 450 N.Y.S.2d 776, 436 N.E.2d 182 (1982)). To be liable under either conspiracy or aiding and abetting, however, the defendant "must know the wrongful nature of the primary actor's conduct," *id.* at 123, and the conduct must be tied to a substantive cause of action, *Chrysler Capital Corp.*, 778 F.Supp. at 1267. In this regard, Plaintiffs rely on the ATCA, RICO, the TVPA, the ATA, and various state laws, including wrongful death, survival, intentional infliction of emotional distress, trespass, assault and battery, negligence, and negligent infliction of emotional distress.

1. ATCA

[73] The Alien Tort Claims Act provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. "This statute confers subject matter jurisdiction when the following three conditions are satisfied: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations (i.e., international law)." *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir.1995); *see also Flores v. Southern Peru Corp.*, 343 F.3d 140, 143 n. 2 (2d Cir.2003). Certain Plaintiffs in these actions are aliens and the complaints all allege common law torts. The Court finds that "aircraft hijacking is generally recognized as a violation of international law." *Burnett I*, 274 F.Supp.2d at 100 (citing *Kadic*, 70 F.3d at 240; *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 447–49 (2d Cir.2000)). Further, "courts, including the Second Circuit, have almost unanimously permitted actions premised on a theory of aiding and abetting and conspiracy." *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F.Supp.2d 289, 311 (S.D.N.Y.2003). Accordingly, the ATCA may provide a basis for a concerted action claim of material support by alien-Plaintiffs here. *See Burnett I*, 274 F.Supp.2d at 100.

2. RICO

"To state a claim under civil RICO, a plaintiff must plead seven elements: (1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce." *Berk v. Tradewell, Inc.*, Nos. 01 Civ. 9035, 01 Civ.

10068(MBM), 2003 WL 21664679, at *11 (S.D.N.Y. July 16, 2003) (quoting *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir.1983)); *see also* 18 U.S.C. § 1962. "Civil RICO is an unusually potent weapon ... 'courts should strive to flush out frivolous RICO allegations at an early stage of the litigation.'" *Katzman v. Victoria's Secret*, 167 F.R.D. 649, 655 (S.D.N.Y.1996).

[74] The *Federal* complaint asserts a RICO claim under § 1962(a), which states in part: "It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated a principal within the meaning of 18 U.S.C. § 2, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(a). "Because the conduct constituting a violation of § 1962(a) is investment of racketeering income, a plaintiff must allege injury from the defendant's investment of the racketeering income to recover under § 1962(a)." *Ouaknine v. MacFarlane*, 897 F.2d 75, 83 (2d Cir.1990). The *Federal* Plaintiffs have not done that here and seem to abandon the § 1962(a) claim in their RICO statements. Accordingly, the *Federal* Plaintiffs have not stated a claim under 18 U.S.C. § 1962(a).

The *Federal* Plaintiffs' RICO statements against Arab Bank and the SAAR Network assert claims under § 1962(c) and § 1962(d). *See* 03 MDL 1570 Docket ## 307, 309. Subsection (c) states, in part: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). "The four elements of Section 1962(c) are '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'" *U.S. Fire Ins. Co. v. United Limousine Serv., Inc.*, 303 F.Supp.2d 432, 451 (S.D.N.Y.2004). "The elements of section 1962(c) must be established as to each individual defendant." *Id.* Paragraph (d) states that it "shall be unlawful for any person to conspire to violate any provision of" § 1962(a)-(c). 18 U.S.C. § 1962(d). "The Second Circuit has held in the context of a motion to dismiss that to state a claim under [§] 1962(d), the 'complaint must allege some factual basis for a finding of a conscious agreement among the defendants.'" *Am. Arbitration Ass'n, Inc. v. DeFonseca*, No. 93 Civ. 2424(CSH), 1996 WL 363128, at *7 (S.D.N.Y. June 28, 1996) (quoting *Hecht v. Commerce Clearing House*, 897 F.2d 21, 26 n. 4 (2d Cir.1990)); *see also Schmidt v. Fleet Bank*, 16 F.Supp.2d 340, 354 (S.D.N.Y.1998) ("Bare and conclusory allegations are insufficient to withstand a motion to dismiss and a plaintiff must plead facts sufficient to show that each defendant knowingly agreed to participate in the [RICO] conspiracy.").

[75, 76] Assuming for now that the Plaintiffs have pleaded an enterprise, "[u]nder *Reves v. Ernst & Young*, 507 U.S. 170, 179, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993), an alleged RICO defendant must have had 'some part in directing' the 'operation or management' of the enterprise itself to be liable." *Dubai Islamic Bank v. Citibank*, N.A., 256 F.Supp.2d 158, 164 (S.D.N.Y.2003). The complaints allege the moving Defendants may have assisted al Qaeda, but they do not allege "anything approaching active 'management or operation.'" *Id.* Accordingly, the Court finds

Plaintiffs have failed to state a RICO claim against the moving Defendants. *See id.; Redtail Leasing, Inc. v. Bellezza*, 95 Civ. 5191(JFK), 1997 WL 603496, at *5 (S.D.N.Y.1997) ("A defendant does not 'direct' an enterprise's affairs under § 1962(c) merely by engaging in wrongful conduct that assists the enterprise."); *Dep't of Econ. Dev. v. Arthur Andersen & Co.*, 924 F.Supp. 449, 466–67 (S.D.N.Y. 1996) (providing services to racketeering enterprise is not directing the enterprise); *LaSalle Nat'l Bank v. Duff & Phelps Credit Rating Co.*, 951 F.Supp. 1071, 1090 (S.D.N.Y.1996) (same). Plaintiffs' RICO claim under § 1962(d) fails for the same reason. Plaintiffs have not alleged that the moving Defendants were central figures in the underlying schemes or for conspiracy liability under § 1962(d). The RICO claims against the moving Defendants are dismissed.

3. TVPA

[77, 78] "The TVPA establishes a cause of action in federal court against an individual who, under actual or apparent authority, or color of law, of any foreign nation subjects an individual to torture or extrajudicial killing." *Arndt v. UBS AG*, 342 F.Supp.2d 132, 141 (E.D.N.Y.2004) (citing *Flores*, 343 F.3d at 153); 28 U.S.C. § 1350 note. Only individuals maybe sued under the TVPA. *Arndt*, 342 F.Supp.2d at 141 (citing *Friedman v. Bayer Corp.*, No. 99 Civ. 3675, 1999 WL 33457825, at *2 (E.D.N.Y. Dec. 15, 1999)). Accordingly, to the extent Plaintiffs have not already withdrawn these claims, the TVPA claims are dismissed against Al Rajhi Bank, Saudi American Bank, Arab Bank, Al Baraka Investment & Development Corp., NCB, Saudi Binladin Group, and the SAAR Network. Similarly, there have been no allegations that Saleh Abdullah Kamel or Adel Batterjee acted under color of law and, therefore, the TVPA claims against these individuals are dismissed as well.

4. ATA

[79, 80] The ATA provides a civil remedy for "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs." 18 U.S.C. § 2333(a).[39] To adequately plead the provision of material support under this section, a plaintiff would have to allege that the defendant knew about the terrorists' illegal activities, the defendant desired to help those activities succeed, and the defendant engaged in some act of helping those activities. *Boim II*, 291 F.3d at 1023; *see also Boim v. Quranic Literacy Inst.*, 340 F.Supp.2d 885, 906–913 (N.D.Ill. 2004) ("*Boim III*") (granting summary judgment against two entity defendants where record evidence demonstrated the charities' concession that Hamas used terrorism in pursuit of its goals, the organizations' repeated desire to help Hamas by

39. The ATA defines international terrorism as: activities that—(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended—to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

18 U.S.C. § 2331(1). For now, the Court assumes the attacks of September 11 were an act of international terrorism.

recruiting donations to the Holy Land Foundation, a known supporter of Hamas, distributing pro-Hamas literature, and featuring pro-Hamas speakers at their meetings); *see also Burnett I*, 274 F.Supp.2d at 107 (noting the complaint in *Boim* was quite specific in its allegation of a causal link). Under a conspiracy theory, the Plaintiffs have to allege that the Defendants were involved in an agreement to accomplish an unlawful act and that the attacks of September 11 were a reasonably foreseeable consequence of that conspiracy. *See Boim III*, 340 F.Supp.2d at 895 (framing analysis as what plaintiffs have to prove to succeed on summary judgment). Plaintiffs do not have to allege that Defendants knew specifically about the September 11 attacks or that they committed any specific act in furtherance of that attack. *Id.*

5. Wrongful Death and Survival

[81] New York Estates, Powers and Trusts Law governs Plaintiffs' claims of wrongful death and survival. "The personal representative ... of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued." N.Y. Est. Powers & Trusts § 5–4.1 (McKinney 2002); *see also* N.Y. Est. Powers & Trusts § 11–3.2(b) (McKinney 2002) (outlining survival claim: "No cause of action for injury to person or property is lost because of the death of the person in whose favor the cause of action existed. For any injury an action may be brought or continued by the personal representative of the decedent."). Accordingly, the Court finds that if Plaintiffs are personal representatives and their allegations sufficiently allege that Defendants supported, aided and abetted, or conspired with the September 11 terrorists, they will have also stated claims for wrongful death and survival.

6. Assault and Battery and Intentional Infliction of Emotional Distress

[82] The *Federal* Plaintiffs bring claims of assault and battery and intentional infliction of emotional distress. The *Burnett* and *Ashton* Plaintiffs also allege claims of intentional infliction of emotional distress. The statute of limitations for assault and battery and intentional infliction of emotional distress is one year. *Holmes v. Lorch*, 329 F.Supp.2d 516, 523 (S.D.N.Y.2004); N.Y. C.P.L.R. 215(3) (McKinney 2002). The *Federal* Plaintiffs filed their complaint on September 10, 2003, nearly two years after September 11, 2001. Accordingly, their assault and battery and intentional infliction of emotional distress claims are dismissed against the SAAR Network and Arab Bank.

[83, 84] "Under New York law, a claim for intentional infliction of emotional distress requires a showing of (*l*) extreme and outrageous conduct; (2) intent to cause, or reckless disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and the injury; and (4) severe emotional distress." *Stuto v. Fleishman*, 164 F.3d 820, 827 (2d Cir.1999) (citing *Howell v. New York Post Co.*, 81 N.Y.2d 115, 121, 596 N.Y.S.2d 350, 612 N.E.2d 699 (1993)). "'Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.'" *Id.* (quoting *Howell*, 81 N.Y.2d at 122, 596 N.Y.S.2d 350, 612 N.E.2d 699). Courts are to determine whether the al-

leged conduct is sufficiently extreme and outrageous enough to permit recovery. *Stuto*, at 827. The attacks on September 11, 2001 were undoubtedly extreme and outrageous. The Court finds that if the *Ashton* and *Burnett* Plaintiffs's allegations sufficiently allege that Defendants supported, aided and abetted, or conspired with the September 11 terrorists, they will have also stated a claim for intentional infliction of emotional distress. *See Burnett I*, 274 F.Supp.2d at 107–08 (analyzing claims under New York law).

7. Trespass

[85] The *Federal* Plaintiffs bring a claim for trespass on the theory that Defendants assisted and encouraged those who intentionally entered the World Trade Center property. New York courts describe this cause of action as "the interference with a person's right to possession of real property either by an unlawful act or a lawful act performed in an unlawful manner." *N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1361 (2d Cir.1989) (citing *Ivancic v. Olmstead*, 66 N.Y.2d 349, 352, 497 N.Y.S.2d 326, 488 N.E.2d 72 (1985)). To the extent that the *Federal* Plaintiffs sufficiently plead that Defendants acted in concert with the September 11 hijackers, they may proceed with this claim. *Wantanabe Realty Corp. v. City of New York*, 01 Civ. 10137(LAK), 2003 WL 22862646, at *4 (S.D.N.Y. Dec. 3., 2003) (citing *Pittman*, 149 F.3d at 122–23).

8. Negligence

[86–88] In New York, a plaintiff may establish negligent infliction of emotional distress under the bystander or direct duty theory. *Baker v. Dorfman*, 239 F.3d 415, 421 (2d Cir.2000). Under the bystander theory, "a defendant's conduct is negligent as creating an unreasonable risk of bodily harm to a plaintiff and such conduct is a substantial factor in bringing about injuries to the plaintiff in consequence of shock or fright resulting from his or her contemporaneous observation of serious physical injury or death inflicted by the defendant's conduct on a member of the plaintiff's immediate family in his or her presence." *Bovsun v. Sanperi*, 61 N.Y.2d 219, 223–24, 473 N.Y.S.2d 357, 461 N.E.2d 843 (1984). Under the direct duty theory, a plaintiff suffers emotional distress caused by "defendant's breach of a duty which unreasonably endangered [plaintiff's] own physical safety." *Mortise v. United States*, 102 F.3d 693, 696 (2d Cir.1996).

[89–92] To establish a claim for negligence under New York law, "a plaintiff must show that the defendant owed the plaintiff a cognizable duty of care, that the defendant breached that duty, and that the plaintiff suffered damages as a proximate cause of that breach." *King v. Crossland Savings Bank*, 111 F.3d 251, 259 (2d Cir. 1997). The most basic element of a negligence claim is the existence of a duty owed to plaintiffs by defendants. *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 342, 162 N.E. 99 (1928); *see also Burnett I*, 274 F.Supp.2d at 108 (dismissing negligence claims against Defendant Al Haramain Islamic Foundation because complaint failed to allege or identify any duty owed to Plaintiffs). Banks do not owe non-customers a duty to protect them from the intentional torts of their customers. *Renner v. Chase Manhattan Bank*, No. 98 Civ. 926(CSH), 1999 WL 47239, at *13 (S.D.N.Y. Feb. 3, 1999) (citing cases); *Burnett I*, 274 F.Supp.2d at 109 ("Plaintiffs offer no support, and we have found none, for the proposition that a bank is liable for injuries done with money that passes through its hands in the form of deposits, withdrawals, check clearing services, or any other routine banking service."). The

complaints presently before the Court do not allege or identify a duty owed to Plaintiffs by moving Defendants. *See Burnett I*, 274 F.Supp.2d at 108–09. Accordingly, the negligence and negligent infliction of emotional distress claims are dismissed for failure to state a claim.

B. Analysis of Claims Against the Moving Defendants

[93] While applying the liberal notice pleading requirements of Rule 8, the Court notes that in light of "the extreme nature of the charge of terrorism, fairness requires extra-careful scrutiny of Plaintiffs' allegations as to any particular defendant, to ensure that he-or it-does indeed have fair notice of [the claims]." *Id.* at 103–04.

1. Al Rajhi Bank

[94] Al Rajhi Bank was founded in 1987 and now has a network of nearly 400 branch offices throughout Saudi Arabia and seventeen worldwide subsidiaries. *Burnett* Complaint ¶ 84. All the banking Defendants are alleged to have "provided essential support to the al Qaeda organization and operations. The banking Defendants in this lawsuit have acted as instruments of terror, in raising, facilitating and transferring money to terrorist organizations." *Burnett* Complaint ¶ 46. Plaintiffs claim that Al Rajhi Bank is "the primary bank for a number of charities that serve as al Qaeda front groups," including Al Haramain, MWL, WAMY, SJRC, and IIRO. *Burnett* Complaint ¶ 85; Rule 12(e) Statement ¶ 31. "Al Rajhi continues to maintain Al Haramain's accounts despite Al Haramain's designation on March 11, 2002 as terrorist organizations by both the United States and Saudi Arabian authorities." Rule 12(e) Statement ¶ 44. The *Burnett* Plaintiffs claim Al Rajhi Bank knew or had to know that its depositors, Defendant charities WAMY, MWL, IIRC, and SJRC were material supporters of terrorism. Rule 12(e) Statement ¶¶ 44–60.

The *Burnett* Plaintiffs claim that Saudi Arabia has "ineffective and/or rudimentary bank supervisory, anti-money laundering laws and anti-terrorist financing in place." Rule 12(e) Statement ¶¶ 72–78. In 1999, William Weschler of the National Security Council and Richard Newcomb of the Office of Foreign Assets Control traveled to Saudi Arabia to warn Al Rajhi Bank and its regulator, the Saudi Arabian Monetary Agency ("SAMA"), "that their financial systems were being manipulated or utilized to fund terrorist organizations such as Al Qaeda." *Id.* ¶ 75. The United States encouraged SAMA to adopt "know your customer" rules. *Id.* "Despite these warnings, Al Rajhi failed to adopt even the most minimal standards, [which] resulted in the use of Al Rajhi as an instrument of terror and a material supporter, aider and abettor of al Qaeda and international terrorist activities." *Id.* ¶¶ 76–77.

One of the hijackers on board American Airlines Flight 11, Abdulaziz al-Omari, held an account at Al Rajhi Bank. *Burnett* Complaint ¶ 85; Rule 12(e) Statement ¶ 43. Another hijacker, Mohammed Atta, made a transfer to this account at some time. Rule 12(e) Statement ¶ 43. Plaintiffs claim al Qaeda financier Zouaydi asked Abdullah bin Abdul Muhsen al Turki, a counselor to the government of Saudi Arabia, to send money through Al Rajhi. *Burnett* Complaint ¶¶ 388, 538.

The *Burnett* Plaintiffs also claim that Al Rajhi Bank has relationships with Hamas and other terrorists. Rule 12(e) Statement ¶¶ 61–69. Al Rajhi Bank chose Texas-based Infocom to host its website. *Id.* ¶¶ 65, 66. Infocom has provided funding to Hamas and is owned and operated by Hamas leader and designated terrorist, Mousa Marzook. *Id.* There have been transfers made to Marzook and Infocom

from Al Rajhi accounts. *Id.* In "December 1999, Al Rajhi directly funded Tulkarm Charity Committee, a known front for Hamas." *Id.* ¶ 71.

Members of the Al Rajhi family, which owns and controls Al Rajhi Bank, are alleged to have ties to Osama bin Laden's personal secretary. *Id.* ¶ 79. The Al Rajhi family is purportedly a major donor to the SAAR Network, a Defendant here, being investigated by federal authorities in Virginia. *Id.* ¶¶ 80–84. Finally, Al Rajhi family members are allegedly closely associated with wealthy donors to Osama bin Laden. *Id.* ¶ 85 (alleging ties with the Golden Chain).

Judge Robertson found that the only allegation in the Third Amended *Burnett* Complaint that stated a claim upon which relief could be granted was that Al Rajhi Bank acted as an instrument "of terror, in raising, facilitating and transferring money to terrorist organizations." *Burnett I,* 274 F.Supp.2d at 109 (quoting *Burnett* Complaint ¶ 46). Judge Robertson noted that there was no support "for the proposition that a bank is liable for injuries done with money that passes through its hands in the form of deposits, withdrawals, check clearing services, or any other routine banking service." *Id.* In light of the liberal pleading standards, however, Judge Robertson denied Al Rajhi Bank's motion to dismiss and permitted it to request a more definitive statement under Rule 12(e). *Id.* at 110. The *Burnett* Plaintiffs provided an 89–paragraph response on August 27, 2003. Thereafter, Al Rajhi Bank renewed its motion to dismiss pursuant to Rule 12(b)(6).

Al Rajhi Bank argues that Plaintiffs offer no factual allegations in support of their conclusion that Al Rajhi Bank had to know that the charities it supported through Zakat and Hararm[40] payments were really fronts for al Qaeda. Al Rajhi Bank contends it had a legal and religious duty to make its charitable donations and any terrorist activity by the recipient charities was unknown to Al Rajhi Bank. *See* Rule 12(e) Statement ¶¶ 26, 29. Contrary to Plaintiffs' arguments, Al Rajhi Bank submits it did not have a duty, or a right, to inspect the Defendant charities' financial transactions to ascertain the ultimate destination of its donations. *But see* Rule 12(e) Statement ¶ 32 ("Al Rajhi is required to determine that the ultimate recipients of these contributions fall within one of the categories prescribed in the Quran for recipients of Zakat."). Al Rajhi Bank submits that SAMA did not implement any duty to investigate Zakat payments after its meeting with representatives of the National Security Council and Office of Foreign Assets Control.

[95] Plaintiffs do not allege that Al Rajhi Bank provided direct material support to al Qaeda. Rather, Plaintiffs claim Al Rajhi Bank aided and abetted the September 11 terrorists by donating to certain Defendant charities and acting as the bank for these Defendants. New York law and the courts interpreting the ATA in *Boim* make very clear that concerted action liability requires general knowledge of the primary actor's conduct. *See Pittman,* 149 F.3d at 123; *Boim II,* 291 F.3d at 1023; *Boim III,* 340 F.Supp.2d at 906. Even

40. Under Islamic banking laws, Hararm is forbidden income that must be given away. The disposal of Hararm cannot be considered charitable giving. Rule 12(e) Statement ¶ 9. In the 12(e) statement, the *Burnett* Plaintiffs explain that al Qaeda takes advantage of the under-regulated Islamic banking system to move and launder money. 12(e) Statement ¶ 1. Plaintiffs allege that al Qaeda has perverted the Zakat and Hararm principles in Islamic banking to collect and distribute money to individuals and cells throughout the world. *Id.* ¶¶ 4–9; *see also Burnett* Complaint ¶ 43.

with the opportunity to clarify their claims against Al Rajhi Bank, the *Burnett* Plaintiffs do not offer facts to support their conclusions that Al Rajhi Bank had to know that Defendant charities WAMY, MWL, IIRC, and SJRC were supporting terrorism. *See* Rule 12(e) Statement ¶¶ 44–60. "[A] complaint which consists of conclusory allegations unsupported by factual assertions fails even on the liberal standard of Rule 12(b)(6)." *De Jesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 70 (2d Cir.1996).

This Court, like Judge Robertson before it, has found no basis for a bank's liability for injuries funded by money passing through it on routine banking business. *See Burnett I*, 274 F.Supp.2d at 109. Similarly, allegations concerning the Al Rajhi family cannot support a claim against Al Rajhi Bank because there is no allegation that the family members were acting in furtherance of Al Rajhi Bank business. *Tasso v. Platinum Guild Int'l*, 94 Civ. 8288(LAP), 1997 WL 16066, at *6 (S.D.N.Y. Jan. 16, 1997). Plaintiffs attach to their opposition brief a September 2002 SAMA report summarizing the initiatives and actions taken by the Kingdom of Saudi Arabia to combat money laundering and terrorist financing. *See Burnett* Plaintiffs' Opp. to Al Rajhi Motion to Dismiss, Ex. 2. Neither this document, nor the complaint, alleges that SAMA or Al Rajhi Bank implemented "know your customer" rules that Al Rajhi failed to follow with respect to accounts held by the Defendant charities. Finally, Plaintiffs' allegations that Al Rajhi Bank has connections to Hamas supporters fails to state a claim because Plaintiffs have not alleged any relationship between Hamas and al Qaeda or the terrorist attacks of September 11. Even accepting all the allegations against Al Rajhi Bank as true, Plaintiffs have failed to state a claim that would entitle them to relief. Accordingly, Al Rajhi Bank's motion to dismiss the *Burnett* complaint is granted in its entirety.

2. Saudi American Bank

[96] Saudi American Bank is based in Rihadh, Saudi Arabia and was formed in 1980 pursuant to a royal decree to take over the then-existing branches of Citibank in Riyadh and Jeddah. *Ashton* Complaint ¶ 603; *Burnett* Complaint ¶ 140. It is the second largest bank in Saudi Arabia and has offices in the United States, based in New York. *Ashton* Complaint ¶ 604; *Burnett* Complaint ¶¶ 141–42. Its chairman, Abdullahziz Bin Hamad Al Gosaibi is also the Chairman of the Saudi Cement Company in Damman, Saudi Arabia. *Ashton* Complaint ¶ 605; *Burnett* Complaint ¶ 142.[41] Ahmed Ali Jumale, purportedly a close associate of Osama bin Laden and responsible for helping Defendant Al Baraka penetrate the United States banking system, allegedly worked for Saudi American Bank as a senior employee from 1979 to 1986. *Ashton* Complaint ¶ 602; *Burnett* Complaint ¶ 148.[42]

Plaintiffs claim that Saudi American Bank is the official correspondent of the al Baraka Bank Lebanon; the Riyadh correspondent of Defendant Al Faisal Islamic Bank, which is managed by Defendant Prince Mohamed; and the Riyadh correspondent bank for a branch of Defendant Al Shamal Islamic Bank, which is involved in the financing of al Qaeda. *Ashton* Complaint ¶¶ 606, 608; *Burnett* Complaint ¶¶ 143, 146. It is also the bank for Defen-

41. The *Ashton* Plaintiffs voluntarily dismissed its claims against the Saudi Cement Company and the Arabian Cement Company on June 10, 2004. *See* 03 MD 1570 Docket # 230.

42. The *Ashton* Plaintiffs voluntarily dismissed their claims against Ahmed Nur Ali Jumale on June 10, 2004. *See* 03 MD 1570 Docket # 230.

dant Dallah Al Baraka Group, which is chaired by Defendant Saleh Abdullah Kamel. Saudi American Bank is close to the Saudi Bin Laden family, . . . appears on its financial transactions" and provides banking services to its Sudanese operations. *Ashton* Complaint ¶¶ 607–8; *Burnett* Complaint ¶¶ 144, 146.

"In the year 2000, the Saudi American Bank participated in the fundraising campaign in Saudi Arabia for collecting donations to the 'heroes of the Al Quds uprising' (Intifada) by providing a bank account and facilities to receive donations for a committee of charity organizations including Defendants WAMY, IIRO and Al Haramain Foundation." *Ashton* Complaint ¶ 609; *Burnett* Complaint ¶ 147.

The essence of Plaintiffs' claim is that through its relationships with other banks and support of the Saudi Binladin group's work in Sudan, Saudi American Bank provided material support to al Qaeda. It is not alleged to have done anything to directly support al Qaeda, Osama bin Laden, or their terrorist agenda. As the Court has stated before, there can be no bank liability for injuries caused by money routinely passing through the bank. Saudi American Bank is not alleged to have known that anything relating to terrorism was occurring through the services it provided. The *Ashton* Plaintiffs have dismissed their claims against Ahmed Nur Ali Jumale, allegedly an associate of Osama bin Laden. To the extent the *Burnett* Plaintiffs continue their claims against him, his employment at Saudi American Bank from 1979 to 1986 cannot be grounds for relief. Osama bin Laden did not organize al Qaeda until the late 1980s, Saudi American Bank is not alleged to have provided Jumale with a veil of legitimacy or shelter. *Cf. Burnett I,* 274 F.Supp.2d at 104 (finding Al Haramain's employment of al Qaeda operative during height of al Qaeda activity a sufficient allegation of providing material support). The complaints have provided Saudi American Bank with no notice of Plaintiffs' claims or grounds for relief. Accordingly, Saudi American Bank's motions to dismiss the *Ashton* and *Burnett* complaints are granted in their entirety.

3. Arab Bank

[97] The *Federal* Plaintiffs claim Arab Bank is a financial institution headquartered in Egypt with branch offices throughout the world, including New York. *Federal* Complaint ¶ 357. Arab Bank claims it is actually a Jordanian bank headquartered in Amman, Jordan. Arab Bank allegedly has "long provided financial services and other forms of material support to terrorist organizations, including al Qaeda." *Federal* Complaint ¶ 358. Further, these Plaintiffs allege that the September 11 attacks were a "direct, intended and foreseeable product of Arab Bank's participation in al Qaeda's jihadist campaign." *Id.* ¶¶ 364, 363. These claims are based on the allegation that Arab Bank has "long known that accounts it maintained were being used to solicit and transfer funds to terrorist organizations [and despite this knowledge] Arab Bank has continued to maintain those accounts." *Id.* ¶ 362. Specifically, the *Federal* Plaintiffs claim Arab Bank accounts have been used for al Qaeda money transfers throughout the world and that Arab Bank maintains accounts for Defendant charities including IIRO, MWL, WAMY, BIF, Blessed Relief (Muwaffaq) Foundation, and Al Haramain. *Id.* ¶¶ 359, 360. Israeli officials allegedly have seized funds associated with several Arab Bank accounts maintained on behalf of known fronts for Hamas and identified by Arab Bank employees, "confirming the bank's specific knowledge that accounts it maintained were being used to sponsor terrorist activity." *Id.* ¶ 361.

The *Burnett* Plaintiffs claim that members of the Spanish al Qaeda cell used Arab Bank to make wire transfers. *Burnett* Complaint ¶ 138 (alleging Arab Bank is "used regularly by al Qaeda's Spanish cell for transfers of cash to members of al Qaeda operating in Germany, Pakistan, Afghanistan, Lebanon, Yemen, Bosnia, and elsewhere"); *id.* ¶¶ 139, 528 (alleging $6,400 wire transfer through Arab Bank from member of Spanish al Qaeda cell to an extremist associated with Chej Salah in Spain). These Plaintiffs conclude that "Arab Bank PLC has materially supported, aided, and abetted and financed al Qaeda." *Id.* ¶ 138.

The *Federal* and *Burnett* complaints do not include any facts to support the inference that Arab Bank knew or had to know that it was providing material support to terrorists by providing financial services to the charity Defendants or by processing wire transfers in Spain. The paragraphs do not allege any involvement by, knowledge of, or participation in any wrongful conduct by Arab Bank. These Plaintiffs do not claim that Arab Bank ignored any regulations regarding their customer accounts. Providing routine banking services, without having knowledge of the terrorist activities, cannot subject Arab Bank to liability. While claiming Arab Bank has ties with known Hamas fronts, the *Federal* complaint does not contain any allegation of a connection between Hamas and Osama bin Laden, al Qaeda, or the September 11 attacks. A complaint alleging conclusions without supporting facts will not survive a Rule 12(b)(6) motion. *In re Cross Media Mktg. Corp. Sec. Litig.*, 314 F.Supp.2d 256, 261 (S.D.N.Y.2004). The *Federal* Plaintiffs asked for leave to amend their complaint with respect to Arab Bank, but they have not offered any facts to support an amendment. Therefore, Arab Bank's motions to dismiss the *Federal* and *Burnett* complaints are granted in their entirety.

4. Al Baraka Investment & Development Corporation and Saleh Abdullah Kamel

[98] The *Ashton* and *Burnett* complaints detail nearly identical claims against Al Baraka Investment & Development Corp. ("Al Baraka") and Saleh Abdullah Kamel. *Ashton* Complaint ¶¶ 583–601; *Burnett* Complaint ¶¶ 47–66. Saleh Abdullah Kamel was born in Saudi Arabia in 1941 and founded Dallah Albaraka Group LLC in 1969. *Ashton* Complaint ¶ 587; *Burnett* Complaint ¶ 51. Dallah Albaraka is a diversified conglomerate based in Jeddah and includes twenty-three banks in Arab and Islamic countries. *Ashton* Complaint ¶ 588; *Burnett* Complaint ¶ 52. Dallah Albaraka is a shareholder of Aqsa Islamic Bank, a bank that Israel has refused to approve, "citing its obvious ties with known terrorists." *Ashton* Complaint ¶¶ 596, 597; *Burnett* Complaint ¶¶ 60, 61. One of Dallah Albaraka's subsidiaries is Dallah Avco Trans–Arabia Co., based in Jeddah. *Ashton* Complaint ¶ 589; *Burnett* Complaint ¶ 53. Omar al Bayoumi, a suspect wanted by the FBI in connection with the September 11 attacks, was the Assistant to the Director of Finance for Dallah Avco and paid rent in San Diego for the house occupied by two September 11 hijackers of American Airlines Flight 77. *Ashton* Complaint ¶¶ 590, 592; *Burnett* Complaint ¶¶ 55, 54. Mr. Kamel is also one of three founders of Defendant Al Shamal Islamic Bank. *Ashton* Complaint ¶ 594; *Burnett* Complaint ¶ 58.

Dallah Albaraka's financial arm is Al Baraka Investment & Development Corp., a wholly owned subsidiary based in Jeddah. *Ashton* Complaint ¶ 593; *Burnett* Complaint ¶ 57. Al Baraka is a holding company with 43 subsidiaries, which are

mainly banks in Arab and Islamic countries. *Ashton* Complaint ¶ 583; *Burnett* Complaint ¶ 47. It also has banks in Chicago, Illinois and Houston, Texas. *Burnett* Complaint ¶ 47. Al Baraka allegedly provided financial infrastructures in Sudan to Osama bin Laden through Defendant charity Al Haramain. *Ashton* Complaint ¶¶ 584, 585, 598; *Burnett* Complaint ¶¶ 48, 49, 62.

Plaintiffs do not offer any factual allegations against Al Baraka or Mr. Kamel to withstand their motions to dismiss. The majority of the complaints' allegations regarding Al Baraka actually concern Dallah Albaraka. The specific allegations against Al Baraka are that through Al Haramain it provided financial infrastructures in Sudan, it provided support to Al Haramain, and it is present in the Sudan banking business through banks it holds. The complaints do not allege that Al Baraka knew or had any reason to know that Al Haramain was supporting terrorism, nor do they allege facts from which such an inference could be drawn.

The allegation that an employee of a Dallah Albaraka subsidiary financially supported two of the hijackers in San Diego does not translate into an allegation that Mr. Kamel provided material support to terrorism or aided and abetted those that provided material support. An employee's actions cannot be a basis for employer liability unless the employee was acting in furtherance of the employer's business. *Tasso,* 1997 WL 16066, at *6. There is no allegation that Mr. Kamel knew Mr. al Bayoumi or directed anyone at the Della Albaraka subsidiary to support al Qaeda or the hijackers. Similarly, the allegation that Mr. Kamel was one of three founders of Al Shamal Islamic Bank in 1983, without additional allegations, does not state a claim for relief. Thus, the *Ashton* and *Burnett* claims against Al Baraka and Mr. Kamel are dismissed in their entirety.

5. NCB

[99] The *Ashton* and *Burnett* Plaintiffs' allegations against NCB are outlined in Part I.B.4. The Court finds it would be premature to analyze Plaintiffs' largely conclusory claims against NCB under Rule 12(b)(6) at this time. NCB may be immune from suit and further discovery if it is found to be an instrumentality of the Kingdom of Saudi Arabia and its actions do not fit within the FSIA's exceptions to immunity. Additionally, the Court is not yet convinced that it would be proper to exercise personal jurisdiction over NCB. Accordingly, NCB's motion to dismiss for failure to state a claim is denied without prejudice. NCB may renew its motion upon completion of the limited jurisdictional discovery—first with respect to its instrumentality status—outlined by the Court above.

6. Saudi Binladin Group

[100] The *Ashton* and *Burnett* allegations against the SBG are outlined in Part II.C.8. The same allegations that warrant limited jurisdictional discovery to investigate whether SBG purposefully directed its activities at the United States and its contacts with the United States preclude dismissal under 12(b)(6) at this time. SBG provided construction support to Osama bin Laden. *Ashton* Complaint ¶¶ 550, 552–53; *Burnett* Complaint ¶¶ 319–22. A branch of SBG purportedly provided shelter to an al Qaeda operative. *Ashton* Complaint ¶ 555; *Burnett* Complaint ¶ 324. SBG has, at some point, had a close relationship with Osama bin Laden, but the complaints do not specify when or whether the relationship continues. While these allegations are certainly not sufficient to reach a jury, if Plaintiffs demonstrate that

this Court has personal jurisdiction over SBG they are entitled the opportunity to develop these claims. SBG's motions to dismiss the *Ashton* and *Burnett* complaints for failure to state a claim are therefore denied without prejudice.

7. SAAR Network

[101] The *Federal* Plaintiffs' allegations against the SAAR Network are outlined in Part II.C.9. The Court's analysis of the SAAR Network's arguments in favor of 12(b)(6) dismissal depend on a predicate finding of which entities are subject to this Court's personal jurisdiction and which entities—and under what circumstances—transferred money to terror fronts. Accordingly, the SAAR Network's motion to dismiss is denied without prejudice. It may be renewed upon completion of personal jurisdiction discovery.

8. Adel A.J. Batterjee

[102] The *Burnett* Plaintiffs' allegations against Mr. Batterjee are outlined in Part II.C.10. For substantially the same reasons the Court found it had personal jurisdiction over Mr. Batterjee, it denies his motion to dismiss for failure to state a claim. The allegations against him and his designation as a terrorist are sufficient to permit the inference that he provided support to al Qaeda directly or through Al Shamal Islamic Bank, BIF, or WAMY. *Burnett* Complaint ¶¶ 75–76, 183–84, 196, 199, 230; Exec. Order 13224.

IV. Conclusion and Order

For the reasons explained above, Prince Sultan's motions to dismiss the *Burnett, Ashton, Tremsky, Salvo, Barrera,* and *Federal Insurance* complaints for lack of subject matter and personal jurisdiction are granted. Prince Turki's motions to dismiss the *Burnett, Ashton, Tremsky, Salvo, Barrera,* and *Federal Insurance* complaints for lack of subject matter and personal jurisdiction are granted. The Kingdom of Saudi Arabia's motion to dismiss the *Federal Insurance* and *Vigilant Insurance* complaints for lack of subject matter jurisdiction are granted. Prince Mohamed's motions to dismiss the *Ashton* and *Federal Insurance* complaints for lack of personal jurisdiction are granted. Mohammad Abdullah Aljomaih's motion to dismiss the *Burnett* complaint for lack of personal jurisdiction is granted. Sheikh Hamad al Husani's motion to dismiss the *Burnett* complaint for lack of personal jurisdiction is granted. Abdulrahman bin Mahfouz's motion to dismiss the *Burnett* complaint for lack of personal jurisdiction is granted. Tariq, Omar, and Bakr Binladin's motion to dismiss the *Burnett* complaint for lack of personal jurisdiction is granted. Al Rajhi Bank's motion to dismiss the *Burnett* complaint for failure to state a claim is granted. Saudi American Bank's motions to dismiss the *Burnett* and *Ashton* complaints for failure to state a claim are granted. Arab Bank's motions to dismiss the *Burnett* and *Federal Insurance* complaints for failure to state a claim are granted. Al Baraka and Saleh Abdullah Kamel's motions to dismiss the *Burnett* and *Ashton* complaints for failure to state a claim are granted. NCB's motions to dismiss the *Burnett* and *Ashton* complaints for lack of subject matter and personal jurisdiction are denied without prejudice. The *Burnett* and *Ashton* negligence claims against NCB are dismissed for failure to state a claim. The Saudi Binladin Group's motions to dismiss the *Burnett* and *Ashton* complaints for lack of personal jurisdiction and failure to state a claim are denied without prejudice, but the TVPA and negligence claims against SBG are dismissed. The SAAR Network's motion to dismiss the *Federal* complaint for lack of personal jurisdiction and failure to state a claim is denied without prejudice. T he RICO,

TVPA, assault and battery, intentional infliction of emotional distress, and negligence claims against the SAAR Network are dismissed. Adel Batterjee's motion to dismiss the *Burnett* complaint is denied.

So ordered.

Lawrence AGEE Plaintiff,

v.

Richard GRUNERT, M.D., Chris Fukuda, M.D., Fletcher Allen Health Care, Inc., and Copley Hospital Defendants.

No. 2:00–CV–169.

United States District Court,
D. Vermont.

Oct. 1, 2004.

Background: Physician brought federal statutory and state contract and tort claims against former partners in medical group practice and others, after partners reported his alleged mental unfitness to practice medicine and placed him on disability leave. Partners moved for summary judgment, and physician cross-moved for summary judgment.

Holdings: The District Court, Sessions, Chief Judge, held that:

(1) under Vermont law, partners did not make false and defamatory statements about physician in reporting his conduct;

(2) partners' statements were conditionally privileged;

(3) physician did not have claim for "restriction of trade" against doctors who raised legitimate concerns about his fitness to practice;

(4) partners' behavior in reporting physician's suspected mental unfitness was not extreme and outrageous conduct that intentionally inflicted emotional distress;

(5) partners did not negligently inflict emotional distress;

(6) physician failed to exhaust administrative remedies on ADA claim; and

(7) physician was not employee for purposes of ADA claim.

Motions granted in part and denied in part.

1. Federal Civil Procedure ⚷2554

On defendants' motion for summary judgment, district court would not consider new claims raised for first time in plaintiff's memorandum in opposition to motion. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

2. Libel and Slander ⚷1

Under Vermont law, the elements of defamation are: (1) a false and defamatory statement concerning another; (2) some negligence, or greater fault, in publishing the statement; (3) publication to at least one third person; (4) lack of privilege in the publication; (5) special damages, unless actionable per se; and (6) some actual harm so as to warrant compensatory damages.

3. Libel and Slander ⚷30

Under Vermont law, partners in medical practice did not make false and defamatory statements in telling hospitals that physician had been determined to be disabled and that he was on disability leave; partners were required under ethics code to question physician's fitness when he attempted surgery despite not having slept for weeks and while on sleep medication, and their group practice agreement provided for his acquiescence in determination

KeyCite Yellow Flag - Negative Treatment
Distinguished by Abecassis v. Wyatt, S.D.Tex., March 31, 2010

392 F.Supp.2d 539
United States District Court,
S.D. New York.

In re: TERRORIST ATTACKS ON SEPTEMBER 11, 2001

Nos. 03 MDL 1570(RCC), 02 Civ. 6977, 03 Civ. 6978, 03 Civ. 9849.
|
Sept. 21, 2005.

Synopsis
Background: Representatives, survivors, and insurance carriers of victims of September 11, 2001 terrorist attacks brought actions against terrorist organization responsible for the attacks and its members and associates, alleged state sponsors of terrorism, and individuals and entities who allegedly provided support to the terrorist organization, asserting causes of action under Torture Victim Protection Act (TVPA), Antiterrorism Act (ATA), Alien Tort Claims Act (ATCA), and Racketeer Influenced and Corrupt Organizations Act (RICO), as well as claims under New York law for aiding and abetting, conspiracy, intentional infliction of emotional distress, negligence, survival, wrongful death, trespass, and assault and battery. Actions were consolidated, various defendants filed motions to dismiss, and plaintiffs moved to supplement the record.

Holdings: The District Court, Casey, J., held that:

[1] Saudi High Commission (SHC) was entitled to immunity under discretionary function exception to Foreign Sovereign Immunities Act (FSIA);

[2] chairman of SHC and Saudi Minister of Interior were entitled to immunity under discretionary function exception to FSIA;

[3] two Saudi officials did not have such minimum contacts with the United States as to support a finding of general personal jurisdiction;

[4] complaint alleging that various Islamic charities and organizations provided support for September 11th attacks, failed to state a claim under TVPA;

[5] allegation that defendant provided a satellite phone battery to terrorist leader sufficiently stated a claim under ATA; and

[6] absent any allegation that defendant had any role in directing an enterprise, allegation that he funneled money to terrorist organization through the charities with which he was involved failed to state a claim under RICO.

Motions granted in part and denied in part.

See also 349 F.Supp.2d 765.

West Headnotes (46)

[1] **International Law**
Evidence of immunity, and fact questions

Pursuant to the Foreign Sovereign Immunities Act (FSIA), a foreign state and its instrumentalities are presumed immune from jurisdiction unless one of the statute's exceptions applies. 28 U.S.C.A. § 1602 et seq.

Cases that cite this headnote

[2] **International Law**
Evidence of immunity, and fact questions

In a challenge to subject matter jurisdiction under the Foreign Sovereign Immunities Act (FSIA), the defendant must present a prima facie case that it is a foreign sovereign; thereafter plaintiff has burden of going forward with evidence showing that, under the exceptions to FSIA, immunity should not be granted. 28 U.S.C.A. § 1602 et seq.

2 Cases that cite this headnote

[3] **Federal Civil Procedure**

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Matters considered in general

Article stating that Islamic aid organizations in Afghanistan, Bosnia, Somalia, and Tajikistan provided funds and cover to terrorists would not be admitted to supplement record on motion to dismiss in action, arising out of the September 11 terrorist attacks, alleging that two Saudi officials involved with Islamic charities were knowingly providing funding for terrorists; plaintiffs failed to explain why they were only able to obtain and translate the article on eve of oral argument, article and its translation were not authenticated, and article did not say officials were put on notice regarding specific charities or that they continued to contribute to those charities with intent that donations would assist terrorists.

Cases that cite this headnote

[4] **International Law**
Extent and effect of immunity

Immunity under Foreign Sovereign Immunities Act (FSIA) extends to agents of a foreign state acting in their official capacities, inasmuch as a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly. 28 U.S.C.A. § 1602 et seq.

1 Cases that cite this headnote

[5] **International Law**
Evidence of immunity, and fact questions

Court is required to give great weight, in determining whether foreign defendants are entitled to immunity under the Foreign Sovereign Immunities Act (FSIA), to any extrinsic submissions made by the foreign defendants regarding the scope of their official responsibilities. 28 U.S.C.A. § 1602 et seq.

2 Cases that cite this headnote

[6] **International Law**
Corporations and other instrumentalities

Saudi High Commission (SHC) made prima facie showing it was entitled to immunity, under Foreign Sovereign Immunities Act (FSIA), in action alleging it had provided funding for terrorists; SHC was created by the Council of Ministers of Kingdom of Saudi Arabia to provide Kingdom's aid to Bosnia and was governed by a Saudi official, its employees were Saudi civil servants, and it could be sued in the Kingdom's administrative court like other Saudi government agencies, and SHC made no explicit waiver of its sovereign immunity inasmuch as any contrary representations by SHC were made prior to the action. 28 U.S.C.A. § 1602 et seq.

Cases that cite this headnote

[7] **International Law**
Extent and effect of immunity

To extent that complaint, in action alleging support for terrorist organizations, alleged that two Saudi officials provided such support through actions undertaken in their government positions, officials made prima facie showing of entitlement to immunity under the Foreign Sovereign Immunities Act (FSIA). 28 U.S.C.A. § 1602 et seq.

Cases that cite this headnote

[8] **International Law**
Extent and effect of immunity

For jurisdiction over agents of a foreign government to be proper under torts exception to Foreign Sovereign Immunities Act (FSIA), plaintiffs must show that defendants' tortious acts caused plaintiffs' injuries and that defendants' actions were not discretionary, i.e., not grounded in their governments' social, economic, or political policies. 28 U.S.C.A. § 1605(a)(5).

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3 Cases that cite this headnote

[9] **International Law**
Extent and effect of immunity

Under the Foreign Sovereign Immunities Act's (FSIA) discretionary function exception, acts which are performed at the planning level of government, as opposed to those at the operational level, are entitled to immunity. 28 U.S.C.A. § 1605(a)(5).

Cases that cite this headnote

[10] **International Law**
Extent and effect of immunity

Relief agency established by government of Saudi Arabia was entitled to immunity, under discretionary function exception to Foreign Sovereign Immunities Act (FSIA), in action alleging it had provided funding for terrorist organization responsible for September 11th attacks; agency's decisions regarding the distribution of humanitarian relief funds were within the discretion of its chairman and his advisors and were guided by government policies. 28 U.S.C.A. § 1605(a)(5).

1 Cases that cite this headnote

[11] **International Law**
Extent and effect of immunity

Chairman of relief agency established by government of Saudi Arabia, and Saudi Minister of Interior, were entitled to immunity, under discretionary function exception to Foreign Sovereign Immunities Act (FSIA), in action alleging their decisions regarding distribution of humanitarian relief funds provided support for terrorist organization responsible for September 11th attacks; allegations stemmed from officials' discretionary functions inasmuch as their decisions were grounded in government's social, economic, and political policy. 28 U.S.C.A. § 1605(a)(5).

5 Cases that cite this headnote

[12] **Federal Courts**
Presumptions and burden of proof

In considering a motion to dismiss for lack of personal jurisdiction, court reviews the complaints and affidavits in the light most favorable to plaintiffs, but does not accept conclusory allegations or draw argumentative inferences. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

8 Cases that cite this headnote

[13] **Constitutional Law**
Non-residents in general
Federal Courts
Contacts with United States as a whole; nationwide jurisdiction

For jurisdiction to exist under rule establishing personal jurisdiction in any district court for cases arising under federal law where defendant has sufficient contacts with the United States as a whole but is not subject to jurisdiction in any particular state, there must be a federal claim, personal jurisdiction must not exist over defendant in any state, and defendant must have sufficient contacts with the U.S. as a whole such that the exercise of jurisdiction does not violate Fifth Amendment due process. U.S.C.A. Const.Amend. 5; Fed.Rules Civ.Proc.Rule 4(k)(2), 28 U.S.C.A.

3 Cases that cite this headnote

[14] **Courts**
Allegations, pleadings, and affidavits

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To establish personal jurisdiction based on a conspiracy theory under New York's long-arm statute, plaintiffs must make a prima facie showing of conspiracy and allege facts warranting an inference that defendant was a member of the conspiracy. NY.McKinney's CPLR 302(a)(2).

3 Cases that cite this headnote

[15] **Conspiracy**
Nature and Elements in General
Conspiracy
Pleading

To plead a valid cause of action for conspiracy, a plaintiff must allege the primary tort and four elements: (1) a corrupt agreement between two or more persons, (2) an overt act in furtherance of the agreement, (3) the parties' intentional participation in the furtherance of a plan or purpose, and (4) the resulting damage or injury.

Cases that cite this headnote

[16] **Courts**
Conspiracy and co-conspirators

To warrant the inference that a defendant was a member of the conspiracy, as would establish personal jurisdiction under New York's long-arm statute, plaintiffs must show that (1) defendant had an awareness of the effects in New York of its activity, (2) the activity of the co-conspirators in New York was to the benefit of the out-of-state conspirators, and (3) the co-conspirators acting in New York acted at the direction or under the control of or at the request of or on behalf of the out-of-state defendant. N.Y.McKinney's CPLR 302(a)(2).

3 Cases that cite this headnote

[17] **Constitutional Law**
Non-residents in general

The exercise of personal jurisdiction must comport with due process requirements, i.e., there must be minimum contacts and the exercise of jurisdiction must be reasonable. U.S.C.A. Const.Amends. 5, 14.

1 Cases that cite this headnote

[18] **Federal Courts**
Related contacts and activities; specific jurisdiction
Federal Courts
Business contacts and activities; transacting or doing business

Specific jurisdiction over a nonresident defendant exists when the forum exercises jurisdiction over the defendant in a suit arising out of defendant's contacts with that forum; general jurisdiction is based on a defendant's general business contacts with the forum.

Cases that cite this headnote

[19] **Federal Courts**
Terrorism

Two officials of Saudi Arabian government did not have such minimum contacts with the United States as to support a finding of general personal jurisdiction, in action alleging their decisions regarding distribution of humanitarian relief funds provided support for terrorist organization responsible for September 11th attacks, despite alleged donations of money to established humanitarian organizations that might have been diverting funds to support terrorists and despite one official's visit to the White House twelve years before the attacks. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

1 Cases that cite this headnote

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[20] **Federal Civil Procedure**
Jurisdictional discovery
Federal Courts
Dismissal or other disposition

District Court would deny without prejudice purported Islamic charitable trust's motion to dismiss, for lack of personal jurisdiction, complaint in action alleging provision of support for terrorists involved in September 11th attacks, pending further jurisdictional discovery as to whether trust's activities were directed at the United States; U.S. Government had designated the trust a Specially Designated Global Terrorist Entity. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

1 Cases that cite this headnote

[21] **Federal Civil Procedure**
Jurisdictional discovery

Courts enjoy great discretion in deciding whether to order jurisdictional discovery before resolving motions to dismiss for lack of personal jurisdiction. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

1 Cases that cite this headnote

[22] **Federal Courts**
Terrorism

Pursuant to rule establishing personal jurisdiction in any district court for cases arising under federal law where defendant had sufficient contacts with the United States as a whole but was not subject to jurisdiction in any particular state, District Court had personal jurisdiction, in action alleging provision of support for terrorists involved in September 11th attacks, over defendant alleged to be a founder and leader of terrorist organization responsible for the attacks; defendant had purposefully directed his activities at the U.S. Fed.Rules Civ.Proc.Rules 4(k)(2), 12(b)(2), 28 U.S.C.A.

2 Cases that cite this headnote

[23] **Constitutional Law**
Non-profit, charitable, and educational organizations
Federal Courts
Terrorism

District Court had personal jurisdiction, under rule establishing personal jurisdiction for cases arising under federal law where defendant had sufficient contacts with the United States as a whole but was not subject to jurisdiction in any particular state, over purported Islamic relief organization, for purposes of action alleging provision of support for terrorists involved in September 11th attacks; organization purposefully directed its activities at the U.S., satisfying due process minimum contacts requirement, inasmuch as it operated in the U.S. and was involved in supporting attacks and activities of the terrorist organization. U.S.C.A. Const.Amend. 5; Fed.Rules Civ.Proc.Rules 4(k)(2), 12(b)(2), 28 U.S.C.A.

Cases that cite this headnote

[24] **Racketeer Influenced and Corrupt Organizations**
Association with or participation in enterprise; control or intent

To state a claim for liability under civil Racketeer Influenced and Corrupt Organizations Act (RICO), plaintiffs must allege that defendants participated in the operation or management of the enterprise itself, which requires that these defendants must have had some part in directing the enterprise's affairs. 18 U.S.C.A. § 1962(c).

Cases that cite this headnote

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[25] **Aliens, Immigration, and Citizenship**
Torture victim protection

Complaint brought under Torture Victim Protection Act (TVPA), alleging that various Islamic charities and organizations provided support for terrorist organization responsible for September 11th attacks, failed to state a claim; TVPA provided a cause of action only against individuals. 28 U.S.C.A. § 1350.

2 Cases that cite this headnote

[26] **Aliens, Immigration, and Citizenship**
Torture victim protection

Absent any allegation that named defendants were acting under color of state law, action brought under Torture Victim Protection Act (TVPA), alleging that various individuals provided support for September 11th attacks, failed to state a claim. 28 U.S.C.A. § 1350.

2 Cases that cite this headnote

[27] **Limitation of Actions**
Injuries to person

Claims, under New York law, for assault and battery and intentional infliction of emotional distress, asserted in action alleging provision of support for September 11th attacks, were time-barred. N.Y.McKinney's CPLR 215(3).

Cases that cite this headnote

[28] **Negligence**
Necessity and Existence of Duty
Negligence
Protection against acts of third persons

Negligence claims, in action under New York law arising out of September 11th attacks, would be dismissed for failure to state claims inasmuch as they failed to allege or identify duty owed to plaintiffs by defendants.

1 Cases that cite this headnote

[29] **War and National Emergency**
Private Remedies

Allegation that defendant provided a satellite phone battery to leader of terrorist organization responsible for September 11th attacks sufficiently stated a claim under Antiterrorism Act (ATA), for purposes of action alleging provision of support for terrorists involved in those attacks. 18 U.S.C.A. § 2339A(b).

1 Cases that cite this headnote

[30] **Racketeer Influenced and Corrupt Organizations**
Association with or participation in enterprise; control or intent

Complaint which failed to allege that defendant participated in the operation or management of any enterprise thus failed to state a claim under Racketeer Influenced and Corrupt Organizations Act (RICO), for purposes of action alleging provision of support for terrorists involved in September 11th attacks. 18 U.S.C.A. § 1961 et seq.

Cases that cite this headnote

[31] **War and National Emergency**
Private Remedies

Complaint which failed to allege that defendant took any action that could be considered the provision of material support for terrorist organization responsible for the September 11th attacks thus failed to state a claim under the Antiterrorism Act (ATA), for purposes of action alleging provision of support for terrorists

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involved in those attacks. 18 U.S.C.A. § 2339A(b).

Cases that cite this headnote

[32] **War and National Emergency**
Private Remedies

Allegation that defendant funneled money to terrorist organization responsible for September 11th attacks, through charities in which he was involved, was sufficient to state a claim under Antiterrorism Act (ATA), in action alleging provision of support for those attacks. 18 U.S.C.A. § 2339(A).

Cases that cite this headnote

[33] **Racketeer Influenced and Corrupt Organizations**
Association with or participation in enterprise; control or intent

Complaint which failed to allege that defendant had any role in directing an enterprise thus failed to state a claim under Racketeer Influenced and Corrupt Organizations Act (RICO), for purposes of action alleging provision of support for terrorist organization responsible for September 11th attacks. 18 U.S.C.A. § 1961 et seq.

Cases that cite this headnote

[34] **War and National Emergency**
Private Remedies

Absent any allegation that purported charitable organization knew that the money it was transferring between two other organizations would somehow assist terrorist organization responsible for the September 11th attacks, or that it knew that other organizations to which it transferred money were in the business of supporting terrorism, allegation that organization made such transfers failed to state a claim under Antiterrorism Act (ATA), for purposes of action alleging provision of support for those attacks. 18 U.S.C.A. § 2339(A).

Cases that cite this headnote

[35] **War and National Emergency**
Private Remedies

Allegations that defendant was a founder and leader of terrorist organization responsible for the September 11th attacks, that he had been designated a terrorist by the U.S. government, and that he was the head of various non-government organizations providing financial and logistical support to the terrorist network, sufficiently stated a claim under Antiterrorism Act (ATA), for purposes of action alleging provision of support for terrorists involved in those attacks. 18 U.S.C.A. § 2339(A).

Cases that cite this headnote

[36] **War and National Emergency**
Private Remedies

Allegation that purported Islamic relief organization collected and laundered money for terrorist organization responsible for the September 11th attacks, was involved in numerous attacks and plots, and funded the Taliban and terrorist training camps in Afghanistan sufficiently stated a claim under Antiterrorism Act (ATA), for purposes of action alleging provision of support for terrorists involved in those attacks. 18 U.S.C.A. § 2339(A).

Cases that cite this headnote

[37] **Federal Civil Procedure**
Time of determination; reserving decision

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District Court would deny, without prejudice, purported Islamic charitable trust's motion to dismiss, for failure to state a claim, complaints against it in action alleging provision of support for terrorists involved in September 11th attacks, where Court had not yet determined whether it had personal jurisdiction over the trust.

1 Cases that cite this headnote

[38] **War and National Emergency**
Private Remedies

Allegation, that defendants were co-conspirators, material sponsors, and/or aiders and abettors of a network alleged to have provided support for terrorist, was insufficient, without more, to state a claim under Antiterrorism Act (ATA), for purposes of action alleging provision of support for terrorists involved in September 11th attacks; allegations failed to provide notice of the factual grounds on which the claims were based. 18 U.S.C.A. § 2339(A).

Cases that cite this headnote

[39] **War and National Emergency**
Private Remedies

Absent any allegation that organization knew that two purported Islamic charities it allegedly financed were terrorist cells, or whether and how those cells contributed to agenda of terrorist organization responsible for the September 11th attacks, allegation that the organization provided that financial support were insufficient to state a claim under Antiterrorism Act (ATA), in action alleging provision of support for terrorists involved in those attacks. 18 U.S.C.A. § 2339(A).

Cases that cite this headnote

[40] **Racketeer Influenced and Corrupt Organizations**
Association or participation

Absent any allegation that company had any role in directing an enterprise, allegation that it donated money to a group alleged to have later laundered the money, and that it donated money to unnamed entities who later forwarded it to terrorist organization responsible for the September 11th attacks, were insufficient to state a claim under Racketeer Influenced and Corrupt Organizations Act (RICO), in action alleging provision of support for terrorists involved in those attacks. 18 U.S.C.A. § 1961 et seq.

Cases that cite this headnote

[41] **Racketeer Influenced and Corrupt Organizations**
Association or participation
War and National Emergency
Private Remedies

Complaint, alleging that individual defendants aided and abetted, conspired with, and provided material support and resources to terrorist organization responsible for the September 11th attacks and/or affiliated organizations, failed to state claims for violations of Racketeer Influenced and Corrupt Organizations Act (RICO) or Antiterrorism Act (ATA), in action alleging provision of support for terrorists involved in those attacks; complaint did not adequately provide defendants with notice as to how they provided material support to terrorist organization. 18 U.S.C.A. §§ 1961 et seq., 2339(A).

2 Cases that cite this headnote

[42] **War and National Emergency**
Private Remedies

Complaint alleging that defendant controlled several bank accounts and transmitted money

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internationally for terrorist purposes was sufficient to state a claim under Antiterrorism Act (ATA), in action alleging provision of support for September 11th attacks. 18 U.S.C.A. § 2339(A).

2 Cases that cite this headnote

[43] **Racketeer Influenced and Corrupt Organizations**
Association or participation

Absent any allegation that defendant participated in the operation or management of alleged terrorist enterprise, allegation that he controlled several bank accounts and transmitted money internationally for terrorist purposes failed to state a claim under Racketeer Influenced and Corrupt Organizations Act (RICO), for purposes of action alleging provision of support for terrorists involved in September 11th attacks. 18 U.S.C.A. § 1961 et seq.

1 Cases that cite this headnote

[44] **Federal Civil Procedure**
Error by court

A motion for reconsideration is appropriate where a court overlooks controlling decisions or factual matters that were put before it on the underlying motion and which, had they been considered, might have reasonably altered the result before the court.

Cases that cite this headnote

[45] **Federal Civil Procedure**
Justice; prevention of injustice
Federal Civil Procedure
Error by court

A motion for reconsideration may be granted to correct a clear error or prevent manifest injustice.

Cases that cite this headnote

[46] **International Law**
Proceedings to determine immunity

On reconsideration of prior order, District Court would postpone further inquiry into bank's status as a foreign sovereign, for purposes of its assertion that it was entitled to immunity, under Foreign Sovereign Immunities Act (FSIA), in action alleging it provided support for terrorists involved in September 11th attacks, until completion of personal jurisdiction discovery; personal jurisdiction issue was more straightforward and Court was hesitant to subject Kingdom of Saudi Arabia to discovery. 28 U.S.C.A. § 1602 et seq.

3 Cases that cite this headnote

Attorneys and Law Firms

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Opinion and Order

CASEY, District Judge.

The Court presumes familiarity with the factual background giving rise to this multi-district litigation. *See In re Terrorist Attacks on September 11, 2001,* 349 F.Supp.2d 765 (S.D.N.Y.2005) (*"Terrorist Attacks I"*). Generally, Plaintiffs are representatives, survivors, and insurance carriers of the victims of the attacks of September 11, 2001, who allege, pursuant to various theories of liability including the Antiterrorism Act ("ATA"), 18 U.S.C. § 2331 *et seq.;* the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350; the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.;* the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note; theories of aiding and abetting, civil conspiracy, intentional infliction of emotional distress, negligence, survival, wrongful death, trespass, and assault and battery, that Defendants are responsible for those attacks as terrorists, state sponsors of terror, or material sponsors of terror. In *Terrorist Attacks I,* the Court resolved several motions to dismiss the complaints by various Defendants. Additional motions remain pending before the Court.

Saudi High Commission ("SHC"), HRH Prince Salman bin Abdulaziz Al–Saud ("Prince Salman"), and HRH Prince Naif bin Abdulaziz Al–Saud ("Prince Naif") move to dismiss the complaints for lack of subject matter jurisdiction pursuant to the FSIA, lack of personal jurisdiction, and failure to state a claim for relief. Immediately prior to the Court's scheduled oral argument on these motions, the Federal Plaintiffs moved to supplement the record against Prince Salman and Prince Naif.

Defendants Rabita Trust, Wa'el Jalaidan, and International Islamic Relief Organization ("IIRO") move to dismiss the ***547** complaints for lack of personal jurisdiction and failure to state a claim.

Other Defendants move to dismiss the complaints for failure to state a claim. Tarik Hamdi and Abdulrahman Alamoudi move to dismiss the *Burnett* and *Federal* complaints. Success Foundation moves to dismiss the *Burnett* complaint. The *Burnett* Plaintiffs denominate certain Defendants as the "SAAR Network entities." The SAAR Network entities, which include African Muslim Agency, Grove Corporate, Heritage Education Trust, International Institute of Islamic Thought ("IIIT"), Mar–Jac Investments, Mar–Jac Poultry, Reston Investments, Safa Trust, and York Foundation, move to dismiss the *Burnett* complaint. IIIT also moves to dismiss the *Ashton* complaint. In addition to its motion to dismiss *Burnett,* Mar–Jac Poultry moves to dismiss the *Ashton* and *Federal* complaints. The *Federal* Plaintiffs label certain individuals "SAAR Network executives." These Defendants, including Taha Al–Awani, Muhammad Ashraf, M. Omar Ashraf, M. Yaqub Mirza, Iqbal Unus, and Jamal Barzinji, move to dismiss the *Federal* complaint.

Finally, Defendant National Commercial Bank ("NCB") moves for reconsideration of this Court's denial without prejudice of its motions to dismiss the *Ashton* and *Burnett* complaints. The Court resolves all the aforementioned motions in this opinion.

I. Subject Matter Jurisdiction Under the FSIA

[1] [2] Pursuant to the FSIA, a foreign state and its instrumentalities are presumed immune from this Court's jurisdiction unless one of the statute's exceptions applies. *Robinson v. Gov't of Malaysia,* 269 F.3d 133, 138 (2d Cir.2001). "In contrast to a Rule 12(b)(6) motion to dismiss for failure to state a claim, in a challenge to FSIA subject matter jurisdiction, the defendant must present a 'prima facie case that it is a foreign sovereign.' " *Virtual*

Countries v. Republic of South Africa, 300 F.3d 230, 241 (2d Cir.2002) (quoting *Cargill Int'l S.A. v. M/T PAVEL DYBENKO,* 991 F.2d 1012, 1016 (2d Cir.1993)). "Then, the plaintiff 'has the burden of going forward with evidence showing that, under the exceptions to the FSIA, immunity should not be granted.' " *Virtual Countries,* 300 F.3d at 241 (quoting *Cargill,* 991 F.2d at 1016); *see also Terrorist Attacks I,* 349 F.Supp.2d at 792–797 (explaining that the possibly relevant exceptions to immunity in this litigation include the commercial activities, torts, and state sponsor of terrorism exceptions). Determining whether this burden is met involves a 'review [of] the allegations in the complaint, the undisputed facts, if any, placed before [the court] by the parties, and—if the plaintiff comes forward with sufficient evidence to carry its burden of production on this issue—[resolution of] disputed issues of fact.' " *Virtual Countries,* 300 F.3d at 241 (quoting *Robinson,* 269 F.3d at 141). Throughout the inquiry, Defendants retain the burden of persuasion, which they must meet by a preponderance of the evidence. *Virtual Countries,* 300 F.3d at 241; *see also Robinson,* 269 F.3d at 141 n. 8.

A. Allegations Against Defendants Asserting Foreign Sovereign Immunity

1. Saudi High Commission[1]

In 1993, then-King Fahad bin Abdulaziz Al–Saud, the President of the Council of ***548** Ministers of Saudi Arabia, decreed the formation of SHC, also known as the Saudi High Relief Commission, by High Order 17419. (*Ashton* Compl. ¶ 446; *Burnett* Compl. ¶ 392; *Federal* Compl. ¶ 180; *see also* SHC Mem. in Sup. Mot. to Dismiss at 3.) The same High Order named Defendant Prince Salman the President of SHC. (*Ashton* Compl. ¶ 446; *Burnett* Compl. ¶ 392; SHC Mem. in Sup. Mot. to Dismiss at 3.)

SHC allegedly has contributed $600 million to aid "Bosnian Muslims impoverished by the country's recent civil war." (*Ashton* Compl. ¶ 446; *Burnett* Compl. ¶ 392.) Plaintiffs claim, however, that SHC does not provide support to the needy but actually diverts funds for terrorist activities. (*Ashton* Compl. ¶ 454; *Burnett* Compl. ¶ 404.) In support, Plaintiffs allege that Prince Salman received a letter in September 2000 from a Bosnian association claiming SHC did not provide charitable assistance, and that none of the money collected after the fall of Srebrenica in July 1995 actually reached the Srebrenican people. (*Ashton* Compl. ¶¶ 454–55; *Burnett* Com pl. ¶¶ 404–05; *Federal* Compl. ¶¶ 185, 457.) Plaintiffs claim SHC's financial records fail to account for $41 million. (*Ashton* Compl. ¶ 456; *Burnett* Compl. ¶ 407; *Federal* Compl. ¶ 460.) SHC allegedly made donations to charity Defendant Taibah and the bin Laden Establishment. (*Ashton* Compl. ¶¶ 376, 462 (relying on 1995 bin Laden interview); *Burnett* Compl. ¶ 298.) Plaintiffs also claim that SHC is responsible for "importing the extreme form of Saudi Islam, Wahhabism" to Bosnia. (*Ashton* Compl. ¶ 447; *Burnett* Compl. ¶ 393.)

The *Federal* Plaintiffs allege that al Qaeda fighters began entering Bosnia–Herzegovina in 1992 disguised as SHC relief workers. (*Federal* Compl. ¶ 183.) On October 21, 2001, a group of Algerians who were supposedly part of the al Qaeda network were arrested in Bosnia Herzegovina on charges of terrorism directed at the United States embassy. (*Ashton* Compl. ¶¶ 448–49; *Burnett* Compl. ¶¶ 394–95.) One of the arrested, Sabir Lamar, apparently worked for SHC as an Arabic language teacher. (*Ashton* Compl. ¶ 450; *Burnett* Compl. ¶ 396.) Also in October 2001, Plaintiffs claim that United States forces raided the Sarajevo branch of SHC and "found computer hard drives with photographs of the World Trade Center before and after its collapse as well as photos of United States embassies in Kenya and Tanzania and the U.S.S. Cole." (*Ashton* Compl. ¶ 451; *Burnett* Compl. ¶ 397; *Federal* Compl. ¶ ¶ 186, 458.) The U.S. forces also apparently found files on pesticides and crop dusters, the locations of Washington government buildings, fake State Department badges, and cash. (*Ashton* Compl. ¶¶ 451, 453; *Burnett* Compl. ¶¶ 397, 399; *Federal* Compl. ¶¶ 186, 459.) After the raid, the Financial Police of the Federation of Bosnia Herzegovina Ministry of Finance analyzed the seized documents and stated that some did "not belong in the scope of work of a humanitarian organization." (*Federal* Compl. ¶¶ 187, 459; *see also Ashton* Compl. ¶ 452; *Burnett* Compl. ¶ 398.) The *Federal* Plaintiffs claim that the SHC "has long acted as a fully integrated component of al Qaida's logistical and financial support infrastructure ... [and that the attacks of September 11 were] a direct, intended and foreseeable product of [its] participation in al Qaida's jihadist campaign." (*Federal* Compl. ¶¶ 182, 189.)

*549 2. Prince Salman[2]

Prince Salman is a member of the Kingdom of Saudi Arabia's Council of Ministers, the governor of the province of Riyadh, and the President of Defendant SHC. (Prince Salman Mem. in Sup. Mot. to Dismiss at 2.) Plaintiffs allege that Prince Salman provided material support to Osama bin Laden and al Qaeda. (*Ashton* Compl. ¶ 255; *Burnett* Compl. ¶ 403; *Federal* Compl. ¶¶

455, 463; *see also Federal* RICO Statement Applicable to Saudi Princes at Ex. A.) The Federal Plaintiffs claim Prince Salman "fully intended [SHC] would serve as a vehicle for funding and supporting Islamic militants in Bosnia, including elements of the al Qaida movement." (*Federal* Compl. ¶ 456.) "Prince Salman knowingly failed to take appropriate actions regarding the management and use of funds of the SHC in Bosnia." (*Ashton* Compl. ¶ 457; *Burnett* Compl. ¶ 406.) On December 30, 2000, the Embassy of the State of Palestine in Riyadh sent Prince Salman a letter expressing Yasser Arafat's concern regarding the funding of radical organizations in Palestine. (*Ashton* Compl. ¶ 291; *Burnett* Compl. ¶ 402.) Further, Plaintiffs claim Prince Salman "has a history of funding Islamic extremism," because he was named the Chairman of the General Donation Committee for Afghanistan in 1980, which gave $39 million to aid the Afghan mujahideen. (*Ashton* Compl. ¶ 289; *Burnett* Compl. ¶ 400.)

In 1994, Prince Salman allegedly stated that he had personally raised more than six million Saudi Riyals for Defendant IIRO and Sanabel al-Kheer. (*Federal* Compl. ¶ 462.) And in 1998, he allegedly donated one million Saudi Riyals during a fundraising drive by IIRO and Sanabel al-Kheer. (*Federal* Compl. ¶ 461.) In 1999, Prince Salman donated $400,000 during a fundraising event organized by charity Defendants IIRO, World Assembly of Muslim Youth ("WAMY"), and Al–Haramain Foundation for the benefit of Bosnia Herzegovina and Chechnya. (*Ashton* Compl. ¶ 290; *Burnett* Compl. ¶ 401; *Federal* Compl. ¶ 461.) Finally, Plaintiffs claim that members of the Saudi royal family have assets and do business in the United States. (*Ashton* Compl. ¶ 296.)

3. Prince Naif[3]

Prince Naif has been the Minister of Interior of the Kingdom of Saudi Arabia since 1975. (*Ashton* Compl. ¶ 286; *Federal* Compl. ¶ 433; Prince Naif Mem. in Supp. Mot. to Dismiss at 1, 5.) According to Plaintiffs, the Minister of Interior "controls the activities of Islamic Charities and is empowered to verify their legality and conduct." (*Ashton* Compl. ¶ 286; *Burnett* Compl. ¶ 382; *see also Federal* Compl. ¶ 435 (alleging that as Minister of Interior Prince Naif is "responsible for the oversight of charities based within Saudi Arabia, including the operations of the Saudi Joint Relief Committee [('SJRC')], Muslim World League [('MWL')], IIRO, Saudi Red Crescent, WAMY, and al Haramain Foundation").) He is also a member of the Council of Ministers and serves on the Supreme Council for Islamic Affairs. (Plaintiff's Mem. in Opp'n to Prince Naif's Mot. at 2–3, 5.)

Plaintiffs claim that "Prince Naif has engaged in a pattern of conduct that aids, abets, and materially sponsors international terrorism and Al Qaeda." (*Ashton* Compl. ¶¶ 288, 255; *Burnett* Compl. ¶¶ 342, 381; *Federal* Compl. ¶ 434; *see also Federal* RICO Statement Applicable to Saudi Princes at Ex. A.) They claim that along with other Saudi princes, Prince ***550** Naif made "monetary payoffs to Osama bin Laden's al Qaeda." (*Ashton* Compl. ¶ 288; *Burnett* Compl. ¶ 381.) "In 1996, according to various intelligence sources, a group of Saudi princes ... met in Paris and agreed to continue contributing, sponsoring, aiding and abetting Osama bin Laden's terrorist network." (*Burnett* Compl. ¶ 347.) Plaintiffs claim that Prince Naif and the Saudi government received warnings from the United States and France that charitable donations to Islamic charities were being used to fund terrorism. (See Plaintiffs' Mem. in Opp'n to Naif's Mot. to Dismiss at 5.) Prince Naif was present for one such meeting in 1994 with French Interior Minister Charles Pasqua. (Id.) The *Federal* Plaintiffs allege that Prince Naif has used his position as the Minister of Interior to "protect al Qaida's support infrastructure." (*Federal* Compl. ¶ 438.)

The *Federal* complaint further alleges that "[b]etween 1998 and 2000, the Kingdom of Saudi Arabia, through SJRC, diverted more than $74 million to al Qaida members and loyalists affiliated with SJRC bureaus. Throughout this time, [SJRC] was under the supervision and control of ... Prince Naif." (*Federal* Compl. ¶¶ 126, 436.) "Prince Naif also heads the Saudi Committee for Relief to Afghans, ... [i]n this position, Prince Naif has channeled substantial financial and logistical support to sustain al Qaida's presence and operations in Afghanistan." (*Id.* ¶ 437.) Plaintiffs allege that Prince Naif is the "Chairman of the Saudi Arabian Committee for Support of the Intifada al Quds, [which] knowingly transferred large sums of money to the families of Hamas terrorists who had executed murderous attacks against Israelis." (*Ashton* Compl. ¶ 287; *Burnett* Compl. ¶ 379; *Federal* Compl. ¶ 439; *see also Burnett* Compl. ¶ 380 (citing letter written on behalf of Yasser Arafat and claiming this committee funds radical groups).) As a result, Plaintiffs assert that "Prince Naif ... supports suicide martyrs." (*Ashton* Compl. ¶ 287; *Burnett* Compl. ¶ 379.) The *Federal* Plaintiffs also allege that in 2003, U.S. Senator Charles Schumer asked that Prince Naif be replaced as Interior Minister because of his "well-documented history of supporting terrorist financing and ignoring the evidence when it comes to investigating terrorist attacks on Americans." (*Federal* Compl. ¶ 441.) Finally, the *Federal* Plaintiffs claim Prince Naif made significant personal contributions to

Saudi-based charities that were sponsors of al Qaida's operations, including IIRO, MWL, WAMY, BIF, SHC, SJRC, and al Haramain. (*Federal* Compl. ¶¶ 442–43.)

[3] The Federal Plaintiffs seek leave to supplement the record against Prince Salman and Prince Naif with an article that appeared in *Rus al Yusef,* an Egyptian publication, in August 1998. The unidentified author writes that Islamic aid organizations located in Afghanistan, Bosnia, Somalia, and Tajikistan provided funds and cover to terrorists. (*See Federal* Mot. to Supplement Record on Prince Naif and Prince Salman, Ex. 2, at 2.) Donors to these unidentified organizations "probably ha[d] no idea where their charity money ha[d] gone." (*Id.*) Prince Naif reportedly responded that "if charity money is going to illegitimate targets, it must stop immediately." (*Id.*) From this submission, the Plaintiffs argue that the Princes knew their charitable donations were going to terrorists.

The submission is problematic for a variety of reasons and will not be accepted. First, Plaintiffs do not provide an explanation as why they were only able to obtain and translate the article on the eve of oral argument—well after the motions were fully submitted. Second, the article and ***551** its translation have not been authenticated. More pointedly, however, it simply does not say that the Princes were put on notice regarding specific charities and that they continued to contribute to those charities with the intent that their donations would assist al Qaeda. The *Federal* Plaintiffs' motion to supplement the record against Prince Salman and Prince Naif is denied.

B. Defendants' Status as Foreign States for FSIA Purposes

[4] The FSIA provides the following definition of "foreign state":

> (a) A "foreign state" ... includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> > (1) which is a separate legal person, corporate or otherwise, and
> >
> > (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> >
> > (3) which is neither a citizen of a State of the United States ... nor created under the laws of any third country.

28 U.S.C. § 1603. Further, "immunity under the FSIA extends also to agents of a foreign state acting in their official capacities [because] [i]t is generally recognized that a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly." *Bryks v. Canadian Broad. Corp.,* 906 F.Supp. 204, 210 (S.D.N.Y.1995) (internal quotations omitted); *see also Terrorist Attacks I,* 349 F.Supp.2d at 788–89 (finding Princes Sultan and Turki were foreign states for FSIA purposes to the extent Plaintiffs alleged liability for actions taken in their official capacities).

1. SHC

[5] SHC contends that it is an organ, agency, or instrumentality of the Kingdom of Saudi Arabia and acts on behalf of the Kingdom to fund a range of humanitarian relief efforts to Bosnia, Egypt, and Somalia. (*See generally* Al–Roshood Decl., at Huffman Decl. Ex. A.) In support of its position as a foreign state, SHC submits the affidavits of Dr. Al–Nafissa, a Saudi Arabian lawyer and a Minister of State on the Council of Ministers in the Kingdom of Saudi Arabia, and Mr. Al–Roshood, who has been the Director of the Executive Office of SHC since its inception. The Court notes it is "required to give 'great weight' to any extrinsic submissions made by the foreign defendants regarding the scope of their official responsibilities." *Leutwyler v. Office of Her Majesty Queen Rania Al–Abdullah,* 184 F.Supp.2d 277, 287 (S.D.N.Y.2001).

King Faud authorized Dr. Al–Nafissa to make his declaration concerning SHC. (Al–Nafissa Decl. ¶ 2, at Huffman Decl. Ex. C.) Dr. Al–Nafissa attests that SHC is "an arm of the Saudi Arabian government [and that its actions] are in keeping with the foreign and domestic governmental policies of the Kingdom of Saudi Arabia." (*Id.* ¶ 3.) SHC was formed by Decision of the President of the Council of Ministers in 1993. (Al–Roshood Decl. ¶ 6.) In the same Decision, the Council of Ministers appointed Prince Salman as President of SHC. (*Id.* ¶ 7.) As President of SHC, Prince Salman is the head of SHC's Executive Committee and Supreme Commission, members of which Prince Salman appoints. (*Id.*) SHC is staffed by civil servant employees of the Kingdom of Saudi Arabia. (*Id.* ¶ 10.)

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Dr. Al–Nafissa states that private charities in the Kingdom of Saudi Arabia receive governmental approval through Royal Order, are run by boards, and disburse ***552** funds in accordance with their charters. (Al–Nafissa Decl. ¶ 5.) In contrast, governmental commissions, such as SHC, are chaired by a governmental official, like Prince Salman, and conduct their affairs in accordance with the Kingdom's policy objectives. (*Id.* ¶ 5.) According to Dr. Al–Nafissa, "[d]ecisions regarding causes to support and recipients for Saudi High Commission funds are within the discretion of the Executive Committee, the Supreme Commission, and Prince Salman." (*Id.* ¶ 8.) The Kingdom of Saudi Arabia is SHC's largest source of funding, having provided approximately 30% of the funds used and distributed by SHC. (Al–Roshood Decl. ¶ 24.) The remainder of SHC funds are collected through fundraisers "in accordance with the directives of ... King Fahd." (*Id.* ¶ 5.) SHC can be sued for its administrative acts in the Board of Grievances. (Al–Nafissa Decl. ¶ 8.)

In their complaint, the *Federal* Plaintiffs alleged that SHC is "an agency, instrumentality and organ of the Kingdom of Saudi Arabia." (*Federal* Compl. ¶ 181.) They now back away from that allegation and join other Plaintiffs in disputing SHC's status. Plaintiffs submit that SHC has repeatedly and systematically described itself as a non-governmental organization in representations to the Bosnian government. (*See* Plaintiffs' Mem. in Opp'n to SHC Mot. to Dismiss at 10.) Thus, even if SHC is considered a foreign state, Plaintiffs assert it has implicitly waived its immunity through those representations. *See* 28 U.S.C. § 1605(a)(1) (FSIA waiver provision). Plaintiffs also argue that it is disingenuous for SHC to simultaneously maintain that it is an organ of the Kingdom and that this Court lacks personal jurisdiction over it when the Kingdom itself did not dispute the personal jurisdiction issue.

In response to Plaintiffs' arguments that it described itself as a non-governmental organization to Bosnian authorities, SHC submits the declaration of Hadsimuratovic Hajrudin, a Bosnian lawyer who serves as a legal advisor to SHC. (*See generally* Hajrudin Decl. at SHC Reply Ex. A.) Mr. Hajrudin states that SHC characterized itself as non-governmental in accordance with Article 22 of the Law on Humanitarian Activities and Humanitarian Organizations of the Federation of Bosnia and Herzegovina because SHC is "not considered part of the government of Bosnia–Herzegovina." (*Id.* ¶ 4.) Mr. Hajrudin attests that the head of SHC's European Office received diplomatic status in Bosnia–Herzegovina in 1996 because SHC is an organization of the Saudi government. (*Id.* ¶ 6.) He also states that the Kingdom of Saudi Arabia is represented by SHC when it makes donations to Bosnia–Herzegovina. (*Id.*)

[6] There is no dispute that SHC is a separate legal person from the Kingdom and not a citizen of the United States or any third country. *See* 28 U.S.C. § 1603. Accordingly, the only dispute regarding SHC's status is whether it is an organ of the Kingdom. In *Filler v. Hanvit Bank,* 378 F.3d 213 (2d Cir.2004), the Second Circuit considered various factors to determine whether an entity could be considered an organ of a foreign sovereign. *Id.* at 217. The factors include:

> (1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law.

Id. at 217 (citations omitted).

SHC offers undisputed evidence that it was created by the Kingdom's Council of ***553** Ministers to "centralize all charitable giving from the Kingdom to Bosnia–Herzegovina [and that it was] vested with the sole authority to collect and distribute charitable funds in Bosnia." (Al–Roshood Decl. ¶¶ 5–6; Hajrudin Decl. ¶ 6 & Ex. D (noting the Kingdom of Saudi Arabia provides humanitarian relief to Bosnia through SHC).) The Council of Ministers appointed Prince Salman to supervise SHC. (Al Roshood Decl. ¶¶ 7–9.) The salaries of SHC employees are paid by either the Kingdom of Saudi Arabia or out of the SHC budget. (*Id.* ¶ 10.) Like other Saudi Arabian government agencies, SHC can be sued in the administrative court of the Kingdom. (Al–Nafissa Decl. ¶ 8.)

The Court finds that SHC has made a prima facie showing that it is a foreign sovereign. *See Cargill,* 991 F.2d at 1016 (requiring defendant to make prima facie case of sovereignty). Because SHC was formed by order of the Kingdom's governing body, it provides the Kingdom's aid to Bosnia, it is governed by a Saudi official and its

employees are civil servants, it is an organ of the Kingdom of Saudi Arabia. *See Filler,* 378 F.3d at 217. Further, the Court finds SHC has not waived its sovereign immunity. The representations to the contrary on which Plaintiffs rely were made before this lawsuit was contemplated and cannot be read as a waiver of immunity from this court's jurisdiction. The Second Circuit has made clear that the waiver of FSIA immunity must be explicit. *See Banco de Seguros del Estado v. Mutual Marine Office, Inc.,* 344 F.3d 255, 261 (2d Cir.2003) (requiring wavier that unambiguously waives claims of immunity from legal proceedings in this country). Finally, Plaintiffs have not identified a factual dispute that would require jurisdictional discovery. *See Filetech S.A. v. France Telecom S.A.,* 304 F.3d 180, 183 (2d Cir.2002) (finding no abuse of discretion where district court resolved jurisdictional issue without holding evidentiary hearing because factual disputes were "readily ascertainable" from the record). Accordingly, Plaintiffs must demonstrate that an exception under the FSIA applies to their claims against SHC. *See Virtual Countries,* 300 F.3d at 241.

2. Prince Salman and Prince Naif

[7] Aside from allegations regarding personal contributions to charities that were fronts for terrorists, the Plaintiffs' claims against Prince Salman and Prince Naif concern their official functions. The allegations against Prince Salman, for example, center on his role as President of SHC, (*see, e.g., Ashton* Compl. ¶ 457; *Burnett* Compl. ¶ 406; *Federal* Compl. ¶ 456) or as Governor of Riyadh, (*see Ashton* Compl. ¶ 291; *Burnett* Compl. ¶ 402). Similarly, the allegations against Prince Naif center on his role as Minister of Interior of the Kingdom. (*See Ashton* Compl. ¶ 286; *Burnett* Compl. ¶ 382; *Federal* Compl. ¶ 435.) To the extent the allegations concern actions undertaken in their government positions, the Court finds that Prince Salman and Prince Naif are foreign states for FSIA purposes. *See Leutwyler,* 184 F.Supp.2d at 286–87 (recognizing that "individuals employed by a foreign state's agencies or instrumentalities are deemed 'foreign states' when they are sued for actions undertaken within the scope of their official capacities"). Thus, Plaintiffs must also show that an FSIA exception applies to Princes Salman and Naif. *Virtual Countries,* 300 F.3d at 241.

Plaintiffs claim any immunity enjoyed by SHC, Prince Salman, and Prince Naif is overcome by the FSIA's torts exception. The *Federal* Plaintiffs also argue that the commercial activities exception should lift ***554** the sovereigns' immunity. For the reasons explained in its previous opinion, the Court concludes that the torts exception is the only exception relevant to the allegations contained in the *Ashton, Burnett,* and *Federal* complaints against SHC, Prince Salman, and Prince Naif. *See Terrorist Attacks I,* 349 F.Supp.2d at 793–94 (explaining that the *Federal* Plaintiffs' reliance on the commercial activities exception is inappropriate because the alleged acts by Defendants were not the type of actions "by which a private party engages in trade and traffic or commerce," and explaining the state sponsor of terrorism exception applies only to designated state sponsors of terror, of which the Kingdom of Saudi Arabia is not).

[8] [9] The torts exception lifts immunity for "personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or any official ... of that foreign state while acting in the scope of his office." 28 U.S.C. § 1605(a)(5). For jurisdiction to be proper under the torts exception, Plaintiffs will have to show, first, that the Defendants' tortious acts caused Plaintiffs' injuries. *Robinson v. Gov't of Malaysia,* 269 F.3d 133, 142 (2d Cir.2001) ("If those activities could not render the Malaysian government liable for a tort under New York law, then it remained immune under § 1605(a)(5)."). Second, Plaintiffs must show that Defendants' actions were not discretionary, i.e., not grounded in the social, economic, or political policies of the Kingdom of Saudi Arabia. *Terrorist Attacks I,* 349 F.Supp.2d at 794–97; *see also* 28 U.S.C. § 1605(a)(5)(A) (providing that the torts exception is not applicable to "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused"). "Under the FSIA's 'discretionary function' exception, 'acts which are performed at the planning level of government, as opposed to those at the operational level, are protected by the immunity.' " *Marchisella v. Gov't of Japan,* No. 02 Civ. 10023(DC), 2004 WL 307248, at *2 (S.D.N.Y. Feb.17, 2004) (quoting *Napolitano v. Tishman Constr. Corp.,* No. 96 Civ. 4402(SJ), 1998 WL 102789, at *4 (E.D.N.Y. Feb.26, 1998)).

Here, since SHC, Prince Salman, and Prince Naif are not alleged to have been the actual perpetrators of the attacks, Plaintiffs rely on theories of conspiracy and aiding and abetting.

C. Application of FSIA Torts Exception

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> Conspiracy and aiding and abetting are varieties of concerted-action liability: conspiracy requires an agreement to commit a tortious act ..., aiding and abetting requires that the defendant have given substantial assistance or encouragement to the primary wrongdoer.... In order to be liable for acting in concert with the primary tortfeasor under either theory, the defendant must know the wrongful nature of the primary actor's conduct.

Pittman v. Grayson, 149 F.3d 111, 122–23 (2d Cir.1998). Accordingly, to survive these Rule 12(b)(1) motions to dismiss, Plaintiffs must plead facts from which it reasonably can be inferred that the Defendants knew or should have known that their tortious actions were supporting terrorists or terrorist fronts. *Terrorist Attacks I,* 349 F.Supp.2d at 800–01; *see also Boim v. Quranic Literacy Inst.,* 291 F.3d 1000, 1023 (7th Cir.2002) (*"Boim II"*) (explaining elements of concerted-action civil liability under ATA); *Virtual Countries,* 300 F.3d at 241 ("Determining whether [Plaintiffs have demonstrated that one of the FSIA's exceptions applies] involves a review of the allegations in the complaint, the undisputed facts, if any, placed before ***555** the court by the parties, and—if the plaintiff comes forward with sufficient evidence to carry its burden of production on this issue—resolution of disputed issues of fact.") (internal quotations omitted).

1. SHC

[10] Even if Plaintiffs alleged that SHC was tortiously liable for the attacks of September 11, such allegations could not overcome the discretionary function exception. SHC offers undisputed evidence that all decisions regarding the distribution of humanitarian relief funds were within the sole discretion of its Chairman Prince Salman and the advisors he selected. (*See* Al–Nafissa Decl. ¶ 8.) Further, SHC was guided by the Kingdom's policies regarding Bosnia–Herzegovina in making its funding determinations. (*Id.* ¶ 3.) Accordingly, SHC's alleged misuse of funds and/or inadequate record-keeping—even if it resulted in the funds going to terrorists—was the result of a discretionary function and cannot be the basis for overcoming SHC's immunity. *See U.S. v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines),* 467 U.S. 797, 814, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984) (explaining FTCA discretionary function exception is designed to "prevent judicial 'second-guessing' of ... decisions grounded in social, economic, and political policy through the medium of an action in tort"); *Marchisella,* 2004 WL 307248, at *2 (explaining the FSIA's discretionary function exception replicates that found in the FTCA and that courts rely on the FTCA for guidance in interpreting the scope of the FSIA's exception); *Kline v. Kaneko,* 685 F.Supp. 386, 392 (S.D.N.Y.1988) (explaining sovereign's decisions regarding formation and enforcement of national policies are discretionary functions); 28 U.S.C. § 1605(a)(5)(A) (stating torts exception is not applicable to claims based discretionary actions, even when that discretion is abused). Accordingly, the Court finds SHC is immune from suit in this litigation. Its motions to dismiss the *Ashton, Burnett,* and *Federal* complaints for lack subject matter jurisdiction are granted.

2. Prince Salman and Prince Naif

[11] Similarly, even if Plaintiffs adequately plead a tort against Prince Salman and Prince Naif, the discretionary function exception prevents this Court from exercising jurisdiction over them in their official capacities. Plaintiffs take issue with Prince Salman's management of SHC and its funding decisions. Prince Salman's direction of SHC, however, is discretionary. He was appointed President of SHC by King Fahd to carry out the Kingdom's policy toward the refugees of the Bosnian war. (Al–Roshood Decl. ¶ 6; Al–Nafissa Decl. ¶ 5.) Plaintiffs claim that as Chairman of the General Donation Committee for Afghanistan he assisted the Afghanistan mujahideen in the 1980s. To the extent Prince Salman held this position as a member of the Saudi government, this was also a policy decision made at the operational level of government. Plaintiffs claim Yasser Arafat complained to Prince Salman as Governor of Riyadh regarding Saudi funding of extremists in Palestine. Plaintiffs do not allege, however, what relation that complaint has to the al Qaeda terrorists or this litigation. They argue that Prince Salman, who did not attend the meeting with the former French Minister of Interior, should have known from Saudi officials who did meet with him that unnamed terrorists were receiving funding from largely unidentified Saudi charities.[4] *See* ***556** *Terrorist Attacks I,* 349 F.Supp.2d at 799. The Saudi attendees' decisions concerning with whom the French Minister's warnings should be shared and what the Saudi response would be, are surely grounded in social, economic, and political policy, and are, therefore, not

actionable under the FSIA. *Varig Airlines,* 467 U.S. at 814, 104 S.Ct. 2755.

Similarly, the claims against Prince Naif stem from his discretionary functions. The Plaintiffs complain that Prince Naif, as Minister of Interior, ignored warnings in 1994 from French Interior Minister Charles Pasqua that Islamic charities were being used to fund terrorism. Additionally, Plaintiffs contend that he did not adequately supervise certain Saudi charities whose diverted funds allegedly landed in the coffers of al Qaeda and Hamas.

Prince Naif's role on the Council of Ministers and as Minister of Interior makes it "nearly self-evident" that his official acts are "squarely covered by the 'discretionary function' language of [the FSIA]." *Burnett II,* 292 F.Supp.2d at 20. As the Minister of Interior, Prince Naif oversees matters relating to Saudi public security, civil defense, fire service, police, passports, special security, and investigative forces. The Council of Ministers, of which he is a member, oversees the implementation of internal, external, financial, economic, educational, defense policies, and general affairs of state for the Kingdom. Prince Naif's official responsibilities included managing Saudi relations with Osama bin Laden, *see* Prince Naif Mem. in Supp. Mot. to Dismiss at 2 (stating Prince Naif urged the Kingdom to strip bin Laden of his Saudi citizenship in 1994), and thus became a target of al Qaeda himself (*see, e.g.,* Bierstein Aff. in Opp'n to Prince Sultan's Mot. to Dismiss (fatwa issued by Osama bin Laden expressing extreme bitterness toward Saudi Royal family).) Therefore, Prince Naif's administration of his responsibilities was "clearly ... grounded in social, economic, and political policy." *Burnett II,* 292 F.Supp.2d at 21 (citing *Varig Airlines,* 467 U.S. at 814, 104 S.Ct. 2755)).

This Court lacks subject matter jurisdiction over Prince Salman and Prince Naif for their official acts. The FSIA does not immunize an official for his private tortious acts, however. *See* 28 U.S.C. § 1605(a)(5) (explaining torts exception is relevant to official's official acts); *Leutwyler,* 184 F.Supp.2d at 286–87 (explaining officials are "deemed foreign states when they are sued for actions undertaken within the scope of their official capacities"). Accordingly, the Court will consider the appropriateness of exercising personal jurisdiction over Prince Salman and Prince Naif for their alleged personal acts below.

II. Personal Jurisdiction

[12] To survive the motions to dismiss under Federal Rule of Civil Procedure 12(b)(2), Plaintiffs must make a prima facie showing that personal jurisdiction exists over each moving Defendant. *PDK Labs, Inc. v. Friedlander,* 103 F.3d 1105, 1108 (2d Cir.1997). The Court reviews the complaints and affidavits in a light most favorable to Plaintiffs, *id.,* but it does not accept conclusory allegations or draw "argumentative inferences." *Mende v. Milestone Tech., Inc.,* 269 F.Supp.2d 246, 251 (S.D.N.Y.2003) (citing *Robinson v. Overseas Military Sales Corp.,* 21 F.3d 502, 507 (2d Cir.1994)).

[13] Plaintiffs offer two bases for personal jurisdiction. First, New York's long-arm statute, which the Court looks to in federal question cases in which no federal statute provides for national service of process or when the Court is sitting in diversity. *PDK Labs,* 103 F.3d at 1108; *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez,* 305 F.3d 120, 124 (2d Cir.2002). ***557** New York's long-arm statute, C.P.L.R. 302(a)(2), provides for personal jurisdiction over a person who, personally or through an agent, "commits a tortious act within the state." Because a co-conspirator can be considered an agent, *see Chrysler Capital Corp. v. Century Power Corp.,* 778 F.Supp. 1260, 1266 (S.D.N.Y.1991), Plaintiffs argue that Defendants are subject to personal jurisdiction here based on the acts of their co-conspirators, the al Qaeda terrorists.

[14] [15] [16] As this Court has previously explained, to establish personal jurisdiction on a conspiracy theory, Plaintiffs must make a prima facie showing of conspiracy and allege facts warranting an inference that the defendant was a member of the conspiracy. *Terrorist Attacks I,* 349 F.Supp.2d at 805. "To plead a valid cause of action for conspiracy ... a plaintiff must allege the primary tort and four elements: '(a) a corrupt agreement between two or more persons, (b) an overt act in furtherance of the agreement, (c) the parties' intentional participation in the furtherance of a plan or purpose, and (d) the resulting damage or injury.' " *Chrysler Capital Corp.,* 778 F.Supp. at 1267 (quoting *Kashi v. Gratsos,* 790 F.2d 1050, 1055 (2d Cir.1986)). Further, "[t]o warrant the inference that a defendant was a member of the conspiracy, Plaintiffs must show that '(a) the defendant had an awareness of the effects in New York of its activity; (b) the activity of the co-conspirators in New York was to the benefit of the out-of-state conspirators; and (c) the co-conspirators acting in New York acted 'at the direction or under the control' of or 'at the request of or on behalf of' the out-of-state defendant." *Terrorist Attacks I,* 349 F.Supp.2d at 805 (quoting *Chrysler Capital Corp.,* 778 F.Supp. at 1268–69). The Court must resolve the question of whether a conspiracy exists "based upon an independent examination of the factual allegations while mindful of its duty to draw all factual inferences in

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plaintiffs' favor." *Daventree v. Republic of Azerbaijan,* 349 F.Supp.2d 736, 760 (S.D.N.Y.2004).

The alternative basis for personal jurisdiction offered by Plaintiffs is found in Federal Rule of Civil Procedure 4(k). Rule 4(k)(1) provides that service of process establishes personal jurisdiction when service is authorized by a federal statute. Here, the ATA provides for personal jurisdiction through its nationwide service of process provision. *See* 18 U.S.C. § 2334(a); Fed.R.Civ.P. 4(k)(1)(D). In situations in which Defendants were not served in the United States pursuant to the ATA, Rule 4(k)(2) acts as a personal jurisdiction gap-filler "in the enforcement of federal law." Fed.R.Civ.P. 4(k)(2) advisory committee's note. For the Court to exercise personal jurisdiction pursuant to Rule 4(k)(2), "there must be a federal claim, personal jurisdiction must not exist over the defendant in New York or any other state, and the defendant must have sufficient minimum contacts with the United States as a whole such that the exercise of jurisdiction does not violate Fifth Amendment due process." *Terrorist Attacks I,* 349 F.Supp.2d at 807 (citing *United States v. Int'l Bhd. of Teamsters,* 945 F.Supp. 609, 617 (S.D.N.Y.1996)).

[17] Under either basis offered by Plaintiffs, the exercise of personal jurisdiction must comport with due process requirements—there must be minimum contacts and the exercise of jurisdiction must be reasonable. *Metro. Life Ins. Co. v. Robertson–Ceco Corp.,* 84 F.3d 560, 567 (2d Cir.1996); *see also Terrorist Attacks I,* 349 F.Supp.2d at 810–11 (reviewing due process requirements); *Ungar v. Palestinian Auth.,* 153 F.Supp.2d 76, 87 (D.R.I.2001) (requiring minimum contacts with the United States for personal jurisdiction under ***558** ATA). If personal jurisdiction is based on New York's long-arm statute, the Fourteenth Amendment's due process standards apply. If jurisdiction is based on Rule 4(k), the Fifth Amendment applies. The analysis is essentially the same. "The principal difference is that under the Fifth Amendment the court can consider the defendant's contacts throughout the United States, while under the Fourteenth Amendment only contacts with the forum state may be considered." *Chew v. Dietrich,* 143 F.3d 24, 28 n. 4 (2d Cir.1998).

Plaintiffs claim that Rule 4(k)'s minimum contacts requirement is satisfied because the Defendants have purposefully directed their activities at the United States. *See Terrorist Attacks I.,* 349 F.Supp.2d at 807 (reviewing the purposefully directed activities theory). This Court has held that to succeed on this theory, "Plaintiffs must make a prima facie showing of each Defendant's personal or direct participation in the conduct giving rise to Plaintiffs' injuries." *Id.* at 809.[5] The Court does not require direct participation in the attacks themselves, but at least participation in al Qaeda's terrorist agenda.

[18] In analyzing a defendant's minimum contacts, courts distinguish between specific and general jurisdiction. "Specific jurisdiction exists when the forum exercises jurisdiction over the defendant in a suit arising out of the defendant's contacts with that forum." *Terrorist Attacks I,* 349 F.Supp.2d at 811 (citing *Metro. Life Ins.* 84 F.3d at 567–68). General jurisdiction is based on a defendant's general business contacts with the forum. Because the defendant's contacts are not related to the suit, a considerably higher level of contacts is generally required and the plaintiff must demonstrate the defendant's continuous and systematic general business contacts with the forum. *Metro. Life. Ins.,* 84 F.3d at 568; *see also Helicopteros Nacionales de Colombia, S.A.,* 466 U.S. 408, 414–16, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984).

In most instances, Plaintiffs do not specify which basis for personal jurisdiction applies to each Defendant, or whether the Defendant was served in the United States pursuant to the ATA's nationwide service of process provision. Accordingly, in analyzing Defendants' motions, the Court considers as a threshold matter whether Plaintiffs have made a prima facie showing of the Defendant's minimum contacts with the United States as a whole.

A. Prince Salman and Prince Naif

Plaintiffs seek to hold Prince Salman responsible for the attacks of September 11, theorizing that Prince Salman purposefully directed his activities at the United ***559** States by contributing to and raising funds for IIRO, Sanabel-al Kheer, WAMY, and Al–Haramain. As for other contacts with the United States, Prince Salman owns stock in two United States corporations based in Texas, and, during a trip to the United States in 1989, he met with President George H.W. Bush and the governor of Maryland. (Plaintiffs' Opp'n to Prince Salman Mot. to Dismiss at 21–22; *see generally* Parrett Aff.) Additionally, Plaintiffs claim that Prince Salman's son attended school in California, had a residence in the United States, owned a corporation that breeds race horses in the United States, and is involved, through his estate, in a New Jersey lawsuit with a former employee. *Id.* They seek jurisdictional discovery to determine if Prince Salman has other contacts here.

Plaintiffs do not allege that Prince Naif has any general contacts with the United States. Rather, they claim that he

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purposefully directed his activities toward the United States by making personal contributions to several Saudi-based charities. (*Federal* Compl. ¶¶ 442–43.)

[19] Plaintiffs must make a prima facie showing that Prince Salman and Prince Naif have minimum contacts with the United States. The minimum contacts requirement is satisfied "if the defendant has 'purposefully directed' his activities at the residents of the forum." *Burger King v. Rudzewicz,* 471 U.S. 462, 474, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). Foreseeability is not enough, there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum." *Id.* Donating money to established humanitarian organizations that may or may not have been diverting funds to support al Qaeda cannot be considered primary participation in intentional wrongdoing expressly aimed at the United States. *Terrorist Attacks I,* 349 F.Supp.2d at 809 (citing *In re Magnetic Audiotape Antitrust Litig.,* 334 F.3d 204, 208 (2d Cir.2003)).

As to Prince Salman's various limited contacts with the United States, they do not support general jurisdiction over him. The 1989 visit to the White House and Maryland is too far removed in time from the 2001 attacks. See, e.g., *Metro. Life Ins. Co.*, 84 F.3d at 569 (explaining that a defendant's "continuous and systematic" contacts with a forum must be examined over a period of time and finding a six-year period reasonable). Prince Salman's deceased son's contacts with the United States are irrelevant to this Court's analysis. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13, 104 S.Ct. 1473, 79 L.Ed.2d 790 ("Each defendant's contacts with the forum State must be assessed individually."). Prince Salman's ownership of shares in Texas corporations, on its own, cannot be considered sufficiently systematic and continuous to establish general jurisdiction. *Helicopteros,* 466 U.S. at 414–16, 104 S.Ct. 1868 (finding CEO's travel to forum for contract negotiations, employees' travel to forum for training, receipt of funds drawn on forum bank accounts, and purchase from forum companies were not contacts sufficiently systematic and continuous to establish general jurisdiction). Plaintiffs have not presented a genuine issue of jurisdictional fact such that discovery is necessary. *Daventree,* 349 F.Supp.2d at 761. Plaintiffs have not satisfied the constitutional requirement of showing that the Princes have minimum contacts with the United States. Accordingly, Prince Salman's and Prince Naif's motions to dismiss the *Ashton, Burnett,* and *Federal* complaints for lack of personal jurisdiction are granted.

***560 B. Rabita Trust**[6]

[20] Plaintiffs allege that Rabita Trust is

> a charitable organization which was created to organize the repatriation and rehabilitation of stranded Pakistanis from Bangladesh. Founded in 1988, the trust fund was started jointly by the government of Pakistan and the Saudi-based charity, [Defendant MWL]. Rabita Trust received the majority of its funding from the MWL and the Saudis, and [has] been involved with terrorism.

(*Ashton* Compl. ¶ 521; *Burnett* Compl. ¶ 268.) The charity initially received funding from its founders to help relocate 250,000 displaced refugees. (*Ashton* Compl. ¶ 522; *Burnett* Compl. ¶ 269.) Plaintiffs assert that Rabita Trust has actually relocated only a few hundred refugees. (*Ashton* Compl. ¶ 522; *Burnett* Compl. ¶ 269.)

On October 12, 2001, the United States Treasury Department designated Rabita Trust a Specially Designated Global Terrorist Entity and froze its assets.[7] (*Ashton* Compl. ¶ 312, 527; *Burnett* Compl. ¶ 236; *Federal* Compl. ¶¶ 117, 214.) Rabita Trust is allegedly related to various other charity Defendants and al Qaeda. For instance, as a subsidiary of MWL, it is a "sibling organization of the IIRO." (*Ashton* Compl. ¶ 525; *Burnett* Compl. ¶ 272; *Federal* Compl. ¶ 113.) Through MWL and its own officers, Rabita Trust is also related to the SAAR Network. (*Ashton* Compl. ¶¶ 338, 526–28; *Burnett* Compl. ¶¶ 273–75; *Federal* Compl. ¶ 213.) Plaintiffs claim that "Rabita Trust is an al Qaeda front" and that its General Director, Wa'el Julaidan, is a known al Qaeda member. (*Ashton* Compl. ¶ 523; *Burnett* Compl. ¶ 270; *Federal* Compl. ¶¶ 100, 121, 210.) In a list of orders obtained in a raid of BIF's Sarajevo's offices, investigators allegedly recovered a document from Osama bin Laden regarding the management of Islamic charities in which he urged the creation of a committee to receive and distribute donations to al Qaeda and suggests Rabita Trust's participation. (*Federal* Compl. ¶¶ 195, 211.)

Rabita Trust claims that it does not have an office in the United States and that the complaints are devoid of any allegations that it directed money to terrorists. It admits

that it has been designated a terrorist, but claims it does not have the same connections to the United States, bin Laden, and al Qaeda that Defendants Benevolence International Foundation ("BIF") and Adel A.J. Batterjee had. *See Terrorist Attacks I,* 349 F.Supp.2d at 823–25 (finding Court had personal jurisdiction over Mr. Batterjee based on his designation as a global terrorist, his role with BIF, another designated terrorist, his ***561** leadership of BIF's United States operations, and his relationship with Osama bin Laden). It also argues that the document that Plaintiffs attribute to Osama bin Laden is similar to the Golden Chain, in that it lacks foundation and authentification. *See Terrorist Attacks I,* 349 F.Supp.2d at 817 ("The 'Golden Chain' is a group of documents that was discovered by Bosnian authorities searching the offices of charity Defendant BIF in March 2002. Plaintiffs claim the 'Golden Chain' contains a list of early direct donors to al Qaeda.")

[21] In assessing whether Rabita Trust has purposefully directed its activities at the United States under Rule 4(k), the Court is mindful of the executive branch's designation of it as a SDGT. While the designation is not dispositive on its own, it does warrant some deference. In the realm of foreign affairs, the executive branch has access to "confidential sources of information [and] agents in the form of diplomatic, consular and other officials." *United States v. Curtiss–Wright Corp.,* 299 U.S. 304, 320, 57 S.Ct. 216, 81 L.Ed. 255 (1936). Entities are designated under Executive Order 13224 if the executive branch determines they are involved in terrorist activities. *See* Executive Order 13224 Fact Sheet. Courts enjoy great discretion in deciding whether to order jurisdictional discovery before resolving motions to dismiss for lack of personal jurisdiction. *See, e.g., APWU v. Potter,* 343 F.3d 619, 627 (2d Cir.2003). This Court finds that such discovery would be helpful in assessing whether any of Rabita Trust's activities were directed at the United States. Accordingly, Rabita Trust's motions to dismiss the *Ashton, Burnett,* and *Federal* complaints are denied without prejudice.

C. Wa'el Jalaidan[8]

[22] The United States Department of Treasury has designated Defendant Jalaidan a terrorist,[9] frozen his assets, and named him "one of the founders of al Qaeda." (*Ashton* Compl. ¶ 304; *Burnett* Compl. ¶ 255; *Federal* Compl. ¶¶ 117, 91.) The Treasury Department "characterized [him] as having 'directed organizations that have provided financial and logistical support to al-Qa-ida, [he] is the logistics chief of bin Laden's organization and fought on bin Laden's side in Afghanistan.' " (*Ashton* Compl. ¶¶ 304, 312, 523–24; *Burnett* Compl. ¶¶ 236, 255, 271; *Federal* Compl. ¶ 117; *see also Federal* Compl. ¶ 196 (claiming documents found in the Bosnian raid of BIF offices contained a note from Osama bin Laden to Jalaidan regarding al Qaeda's need for weapons).) Further, Osama bin Laden and his lieutenant, Abu Zubaydah, allegedly "have acknowledged Wa'el Julaidan as a known associate of their operations. Julaidan has been the head of various non-government organizations providing financial and logistical support to the al-Qa'ida network." (*Ashton* Compl. ¶¶ 304, 312, 341, 484; *Burnett* Compl. ¶ 236, 255.)

Jalaidan was in charge of the MWL in Peshawar, Pakistan and served as the General Director of Rabita Trust. (*Ashton* Compl. ¶ 304; *Burnett* Compl. ¶ 236, 255.) He "operated MWL offices that served in the early days of al Qaeda to attract and train holy warriors from around the world for the war in Afghanistan" and has "repeatedly aided and abetted terrorists." (*Ashton* Compl. ¶¶ 304, ***562** 312; *Burnett* Compl. ¶ 255.) Jalaidan is also allegedly connected to Defendant SJRC. (*Ashton* Compl. ¶ 484; *Federal* Compl. ¶ 125.)

Defendant Jalaidan argues that the allegations against him are simply allegations of guilt by association, and do not include any specificity regarding dates to put his actions in context. He urges the Court to not rely on his designation as a terrorist by the Treasury Department because he did not have an opportunity to rebut it.

Plaintiffs do not claim to have served Mr. Jalaidan in the United States under the ATA's nationwide service provision. Accordingly, Rule 4(k)(2) may provide a basis for personal jurisdiction. There are several federal claims at issue in this litigation and Plaintiffs have not made a prima facie showing that Mr. Jalaidan is subject to personal jurisdiction in New York or any other state. The Court turns to Mr. Jalaidan's contacts with the United States. In addition to being designated as a global terrorist by the Department of Treasury, Mr. Jalaidan is alleged to be a founder and the logistical chief of al Qaeda, and affiliated with several other charities that are allegedly in al Qaeda's fundraising network. In light of al Qaeda's public declarations of war against the United States, someone who is alleged to be a founder, an admitted associate, and a provider of financial and logistical support to al Qaeda, has purposefully directed his activities at the United States such that the exercise of personal jurisdiction over him is reasonable.[10] See *Mwani v. bin Laden*, 417 F.3d 1, 14 (C.A.D.C. 2005).

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D. IIRO[11]

[23] Plaintiffs claim that IIRO has "materially supported terror around the globe, including Osama bin Laden and al Qaeda." (*Ashton* Compl. ¶ 310; *Burnett* Compl. ¶¶ 234, 239; *Federal* Compl. ¶ 133.) In the early 1990s, IIRO "was rapidly becoming al Qaeda's foremost charity used as a means to transfer funds, personnel, and other means of material support." (*Burnett* Compl. ¶ 326; *Federal* Compl. ¶ 142.) Plaintiffs claim IIRO remains "firmly entrenched with Osama bin Laden's al Qaeda organization" because of its support of an al Qaeda guest house in Egypt, its office's close proximity to Osama bin Laden's personal office in Sudan, and its relationship with bin Laden's brother-in-law Defendant Mohammed Jamal Khalifa. (*Ashton* Compl. ¶¶ 310, 315, 317; *Burnett* Compl. ¶¶ 234, 239, 241.)

Mohammed Jamal Khalifa headed IIRO's Philippines office, which served as a center of terrorist financing and training. (*Ashton* Compl. ¶ 310; *Burnett* Compl. ¶ 234; *Federal* Compl. ¶¶ 135–36.) Khalifa collected and laundered money for al Qaeda through IIRO's Phillipines office. (*Ashton* Compl. ¶ 316; *Burnett* Compl. ¶ 240.) Through Khalifa, IIRO was allegedly involved with bombings in Jordan in 1993 and 1994, the 1993 attack on the World Trade Center, plots to assassinate former President Bill Clinton and the late Pope John Paul II and to simultaneously blow up twelve American airliners, and the 1998 Embassy bombings in Africa. (*Ashton* Compl. ¶¶ 310, 318, 510–12; *Burnett* Compl. ¶¶ 189, 234, 239 240, 242; *Federal* Compl. ¶¶ 136, 137, 139.)

***563** Plaintiffs claim IIRO supported al Qaeda terrorists in other ways as well. One of the September 11 hijackers claimed to be working for IIRO's Fazeh Ahed. (*Ashton* Compl. ¶ 322; *Burnett* Compl. ¶ 246.) IIRO allegedly funded the Taliban regime with $60,000,000. (*Ashton* Compl. ¶ 322; *Burnett* Compl. ¶ 246.) Pakistan deported 89 aid workers from the IIRO on the grounds that they were supporting al Qaeda. (*Ashton* Compl. ¶ 322; *Burnett* Compl. ¶ 246; *Federal* Compl. ¶ 144.) Plaintiffs claim IIRO funded al Qaeda training camps in Afghanistan. (*Ashton* Compl. ¶ 556; *Federal* Compl. ¶ 134 (basing allegations on declassified 1996 CIA report alleging IIRO funded six al Qaeda training camps, including those from which it planned, approved, and coordinated the September 11 attacks and where hijackers received training and indoctrination).) IIRO funded Egyptian al-Jihad, a branch of al Qaeda. (*Burnett* Compl. ¶ 243.) IIRO conducted a joint fundraising event with al-Haramain and WAMY in Riyadh, Saudi Arabia in December 1999. (*Burnett* Compl. ¶ 156.)

Defendant MWL is the parent organization of IIRO and uses it as an "operational arm to perform many of its charitable activities." (*Ashton* Compl. ¶ 298; *Federal* Compl. ¶¶ 130–31.) Plaintiffs claim IIRO also works with numerous other charities allegedly affiliated with al Qaeda, including SJRC, BIF, Global Relief Foundation, Taibah International, Islamic African Relief Agency, and WAMY. (*Ashton* Compl. ¶ 320; *Burnett* Compl. ¶¶ 172, 244; *Federal* Compl. ¶ 147.) The FBI raided IIRO's offices in Virginia after September 11, 2001. (*Ashton* Compl. ¶ 322; *Burnett* Compl. ¶ 246.)

Plaintiffs allege that IIRO operates under the name International Relief Organization ("IRO") in the United States in Falls Church, Virginia, and that the IIRO and IRO transfer money to each other and have the same president. (*Ashton* Compl. ¶¶ 311, 320; *Burnett* Compl. ¶¶ 172, 235, 237; *Federal* Compl. ¶ 146 (U.S. branch established in 1991); *see also* Parrett Aff. Ex. 1 (attaching IRO's 1991 certificate of incorporation in Virginia); *id.* Ex. 2 (attaching IRO's 1993 certificate for doing business in Virginia under assumed name of International Islamic Relief Organization (IIRO)).) IIRO claims IRO was finally dissolved as a corporate entity in December 2002. (Saleh bin Abdallah Alsaikhan Decl. ¶ 10.)

The parties agree that this Court's exercise of personal jurisdiction over IIRO depends on its contacts with the United States as a whole under Rule 4(k)(1). The Court looks, therefore, at IIRO's contacts with the United States. It appears that IIRO was operating in the United States until December 2002. It is alleged to have supported an al Qaeda guest house. Through its relationship with Mohammed Jamal Khalifa, it has allegedly been involved in several al Qaeda attacks and plots for other attacks. It has allegedly funded the Taliban and al Qaeda training camps in Afghanistan. The Court finds that Plaintiffs have made a prima facie case that IIRO has purposefully directed its activities at the United States, thus satisfying the constitutional minimum contacts requirement. IIRO's motions to dismiss the *Ashton, Burnett,* and *Federal* complaints are denied.

III. Failure to State a Claim

In these Rule 12(b)(6) motions to dismiss for failure to state a claim, the Court accepts as true the facts alleged in the complaints and draws all reasonable inferences in favor of Plaintiffs. *Harris v. City of New York,* 186 F.3d 243, 247 (2d Cir.1999). The complaints should be dismissed only if it appears beyond doubt ***564** that Plaintiffs can prove no set of facts in support of their claims that would entitle them to relief. *Id.; see also*

Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984) ("A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.").

Federal Rule of Civil Procedure 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz v. Sorema, N.A.,* 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (citing *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 168–69, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993)). Plaintiffs must still give Defendants fair and adequate notice of their claims and the grounds on which they rest. *See Simmons v. Abruzzo,* 49 F.3d 83, 86 (2d Cir.1995). "[W]hile *Swierkiewicz* made clear that pleading a *McDonnell Douglas prima facie* case was not necessary to survive a motion to dismiss, it did not even remotely suggest that a pleading could survive dismissal when it contained only the barest of conclusory allegations without notice of the factual grounds on which they purport to be based." *Jackson v. BellSouth Telecomms.,* 372 F.3d 1250, 1270–71 (11th Cir.2004).

The Court limits its review to the facts stated in the complaints, documents attached to the complaints as exhibits, and documents incorporated by reference in the complaints. *Dangler v. N.Y.C. Off Track Betting Corp.,* 193 F.3d 130, 138 (2d Cir.1999). For purposes of the RICO claims, the Court also reviews the RICO statements.

Plaintiffs claim that Defendants in these lawsuits are liable for the attacks of September 11, in most instances, as co-conspirators, aiders, or abettors with al Qaeda. The Court has held that Defendants may be responsible for the September 11 attacks if they knowingly and intentionally provided material support to al Qaeda. *See Terrorist Attacks I,* 349 F.Supp.2d at 826. The complaints' various theories of recovery merit a brief review here. *See id.* at 825–31.

The ATA provides a civil remedy for "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or estate, survivors, or heirs." 18 U.S.C. § 2333(a). An act of international terrorism includes the provision of material support to terrorists, which is also a criminal act under the ATA. *Boim II,* 291 F.3d at 1015. The ATA's criminal provisions define "material support or resources" as "currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal explosives, personnel, transportation, and other physical assets, except medicine or religious materials." 18 U.S.C. § 2339A(b); *see also Boim II,* 291 F.3d at 1015 (finding conduct that violates § 2339A would be sufficient to meet the definition of "international terrorism" in § 2333). This Court adopts the Seventh Circuit's requirement that Plaintiffs plead that Defendants knew of al Qaeda's illegal activities, "that they desired to help those activities succeed, and they engaged in some act of helping the illegal activities." *Id.* at 1023–24 (finding allegation that defendants are " 'front' organizations with ostensibly legitimate purposes which are actually engaged in ***565** fund-raising and money laundering in support of terrorist activities" and that those defendants "supplied money to Hamas to fund terrorist operations" were sufficient to survive 12(b)(6) motion).

The ATCA provides a basis for relief when an alien sues for a tort committed in violation of the law of nations. 28 U.S.C. § 1350; *Kadic v. Karadzic,* 70 F.3d 232, 238 (2d Cir.1995). Aircraft hijacking is considered a violation of international law, *Kadic,* 70 F.3d at 240, and the ATCA includes "actions premised on a theory of aiding and abetting and conspiracy." *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 244 F.Supp.2d 289, 311 (S.D.N.Y.2003). The ATCA, therefore, may provide a basis of recovery for those Plaintiffs who are aliens.

The *Federal* Plaintiffs include violations of civil RICO in their complaint. Section 1962(c) makes it unlawful "for any person employed by or associated with any enterprise engaged in ... interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). Section 1962(d) makes it "unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." *Id.* § 1962(d). Section 1964 provides for a private right of action to enforce the statute. *Id.* § 1964. Plaintiffs must plead an injury resulting from conduct of an enterprise through a pattern of racketeering activity. *Sedima, S.P.R.L. v. Imrex Co., Inc.,* 473 U.S. 479, 491 (1985).

[24] In *Reves v. Ernst & Young,* 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993), the Supreme Court found that liability under § 1962(c) requires that a defendant be a participant "in the operation or management of the enterprise itself." *Id.* at 185, 113 S.Ct. 1163. The Court stated:

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> Once we understand the word "conduct" to require some degree of direction and the word "participate" to require some part in that direction, the meaning of § 1962(c) comes into focus. In order to "participate, directly or indirectly, in the conduct of such enterprise's affairs," one must have some part in directing those affairs. Of course, the word "participate" makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase "directly or indirectly" makes clear that RICO liability is not limited to those with a formal position in the enterprise, but some part in directing the enterprise's affairs is required.

Id. at 179, 113 S.Ct. 1163. Therefore "to state a claim for liability under § 1962(c), Plaintiffs must allege that the [Defendants] participated 'in the operation or management of the enterprise itself,' which requires that these Defendants must have had some part in directing the enterprise's affairs." *Redtail Leasing, Inc. v. Bellezza,* No. 95 Civ. 5191(JFK), 1997 WL 603496, at *5 (S.D.N.Y. Sept.30, 1997).

[25] [26] The TVPA provides a cause of action against individuals who under actual or apparent authority of any foreign nation subject an individual to torture or extrajudicial killing. 28 U.S.C. § 1350 note; *Arndt v. UBS AG,* 342 F.Supp.2d 132, 141 (E.D.N.Y.2004). The TVPA claims against Rabita Trust, IIRO, Success Foundation, and the SAAR Network entities are dismissed because these Defendants are not individuals. *Arndt,* 342 F.Supp.2d at 141. The TVPA claims against Tarik Hamdi, Abdulrahman Alamoudi, Wa'el Jalaidan, and the SAAR Network executives are dismissed because there is no allegation that these Defendants were acting under ***566** color of state law. In re: South African Apartheid Litigation, 346 F.Supp.2d 538, 548 (S.D.N.Y.2004) (finding no TVPA claim where complaint did not include allegation of individual acting under color of state law or with significant state aid)

Under New York law, Plaintiffs who are personal representatives who sufficiently allege that Defendants caused the death of their represented decedent will have also stated a claim for wrongful death and survival. N.Y. Est. Powers & Trusts Law §§ 5–4.1 (providing claim for wrongful death) and 11–3.2(b) (providing claim for survival).

[27] [28] Plaintiffs bring various torts claims against these Defendants. As the Court explained in *Terrorist Attacks I,* the *Federal* Plaintiffs' claims of assault, battery, and intentional infliction of emotional distress are time-barred, and therefore dismissed against Rabita Trust, Wa'el Jalaidan, IIRO, Tarik Hamdi, Abdulrahman Alamoudi, Mar–Jac Poultry, and the SAAR Network executives. *Terrorist Attacks I,* 349 F.Supp.2d at 829; N.Y. C.P.L.R. 215(3). To the extent the *Ashton* and *Burnett* Plaintiffs plead that Defendants are liable for the September 11 attacks as co-conspirators or aiders or abettors of al Qaeda, they will have pled a claim for relief for intentional infliction of emotional distress, which requires extreme and outrageous conduct, intent to cause severe emotional distress, a causal connection between the conduct and the injury, and severe emotional distress. *See Stuto v. Fleishman,* 164 F.3d 820, 827 (2d Cir.1999). The *Federal* Plaintiffs' trespass claims require "the interference with a person's right to possession of real property either by an unlawful act or a lawful act performed in an unlawful manner." *N.Y. State Nat'l Org. for Women v. Terry,* 886 F.2d 1339, 1361 (2d Cir.1989). Provided the *Federal* Plaintiffs plead that Defendants here acted in concert with the September 11 hijackers, they will have stated a claim for relief for trespass. Finally, the negligence claims against the Defendants are dismissed because the complaints do not allege or identify a duty owed to Plaintiffs by these Defendants. *Terrorist Attacks I,* 349 F.Supp.2d at 830–31.

To summarize, the TVPA and negligence claims against all of the Defendants moving for dismissal under Rule 12(b)(6) here are dismissed. The *Federal* claims of assault and battery and intentional infliction of emotional distress are also dismissed. The Court reviews the complaints to determine if they state a claim for relief under the ATA and RICO. If Plaintiffs state a claim for relief under the ATA, they will have also stated a claim for wrongful death and survival, the *Federal* Plaintiffs will have stated a claim for trespass, and the *Ashton* and *Burnett* Plaintiffs will have stated claims for intentional infliction of emotional distress. Plaintiffs who are aliens will have also stated a claim for relief under the ATCA.

A. Tarik Hamdi[12]

[29] The *Burnett* and *Federal* Plaintiffs allege that after 1996, when Osama bin Laden declared war on Americans, Tarik Hamdi allegedly arranged for the delivery of a battery for a satellite phone used by Osama bin Laden. (*Burnett* Compl. ¶¶ 245, 581 (citing arguments of then-AUSA Kenneth Karas); *Federal* RICO Statement Ex. A.) Osama bin Laden allegedly used that phone and battery pack to coordinate and order the African embassy bombings. (*Federal* RICO Statement Ex. A.)

***567** Plaintiffs also allege that Hamdi is affiliated with various al Qaeda operatives. For instance, he has

connections with the Committee for the Defense of Legitimate Rights ("CDLR") and the Advice and Reformation Committee ("ARC"), two dissident Saudi groups with ties to Osama bin Laden. (*Burnett* Compl. ¶¶ 561–62.) A radical Arabic publication allegedly provided a phone number registered in Hamdi's name when it advertised the contact information of CDLR's U.S. branch. (*Burnett* Compl. ¶ 580.) CDLR published bin Laden's October 12, 1996 fatwa on the Muslim Students Association listserve, the "MSA News." (*Burnett* Compl. ¶ 584.) Plaintiffs claim that ARC allegedly serves as al Qaeda's front in the United Kingdom and facilitates communication to and from Osama bin Laden. (*Burnett* Compl. ¶¶ 562, 564, 575, 577, 584–85.) Hamdi is also alleged to have connections to Khalid al-Fawwaz, one of the masterminds of the embassy bombings. (*Burnett* Compl. ¶ 582.) Finally, Plaintiffs claim Hamdi is a co-conspirator with the SAAR Network. He worked at IIIT in Herndon, Virginia, "the central address surrounding the SAAR Foundation raids, evidence and investigation." (*Burnett* Compl. ¶¶ 267, 583; *Federal* Compl. ¶ 146, 224.)

Hamdi asserts that he is a journalist. He argues that ABC requested that he arrange the interview with Osama bin Laden and that he did not purchase the phone or battery pack. He claims he has not had any ties to CDLR since 1995. He admits that he worked at IIIT as an editor. These factual disputes cannot be resolved on a 12(b)(6) motion.

[30] The *Federal* Plaintiffs have not alleged that Mr. Hamdi participated in the operation or management of any enterprise. The RICO claims against Mr. Hamdi must be dismissed. *See Redtail Leasing, Inc. v. Bellezza,* 1997 WL 603496 at *5. Plaintiffs allege that Mr. Hamdi knew about bin Laden's terrorist activities at the time he procured a phone for him because the first fatwas had already been issued. They allege he provided material support to bin Laden in the form of a satellite phone battery. The ATA includes communications equipment in its definition of material support. *See* 18 U.S.C. § 2339A(b). "[E]ven small donations made knowingly and intentionally in support of terrorism may meet the standard for civil liability in section 2333." *Boim II,* 291 F.3d at 1015. These allegations are sufficient to notify Mr. Hamdi of the claims against him. Tarik Hamdi's motions to dismiss the *Burnett* and *Federal* complaints are denied.

B. Abdulrahman Alamoudi[13]

Defendant Abdulrahman Alamoudi has connections with several organizations that the *Burnett* and *Federal* Plaintiffs claim support terrorism. He is Vice President of Taibah International Aid Association's U.S. branch. (*Federal* Compl. ¶ 245.) Plaintiffs claim Taibah was implicated in the 1998 embassy bombings. (*Federal* Compl. ¶¶ 66, 239, 244.) Additionally, Taibah allegedly works closely with designated-terrorist Global Relief Fund and SHC and has diverted funds to al Qaeda and its affiliates in Bosnia. (*Federal* Compl. ¶¶ 241, 243.) Through Taibah, Alamoudi is also connected with several SAAR Network entities, including American Muslim Council, American Muslim Foundation, Hajj Foundation, Happy Hearts Trust, IIRO, and Success Foundation. (*Federal* Compl. ¶¶ 245, 490; *Burnett* Compl. ¶¶ 237, 248.) He allegedly used his SAAR connections to funnel money to al Qaeda ***568** through various fronts. (*Federal* Compl. ¶ 247.)

Plaintiffs allege that Alamoudi has openly stated his support for Hamas and Hezbollah, both designated terrorist organizations that cooperate with al Qaeda. (*Federal* Compl. ¶¶ 50, 53 *Burnett* Compl. ¶ 237.)

In August 2003, Alamoudi was detained at Heathrow Airport on his way to Syria. Customs officers seized approximately $340,000 in sequentially numbered bills, two U.S. passports, and one Yemeni passport. (*Federal* Compl. ¶ 246.) Alamoudi was arrested by U.S. officials at Washington Dulles Airport on September 28, 2003. (*Federal* Compl. ¶ 247.) He subsequently pleaded guilty to unlicensed travel to and commerce with Libya, false statements on his naturalization application, and tax offenses involving Libyan financial transactions. (*Federal* Mem. in Opp'n at 6.) He is currently serving a twenty-three year sentence. (*Id.*)

[31] [32] [33] The *Burnett* complaint does not allege any act taken by Mr. Alamoudi that could be considered the provision of material support for al Qaeda. The *Federal* complaint is sustained inasmuch as it claims that Mr. Alamoudi funneled money to al Qaeda through the charities with which he was involved. (*Federal* Compl. ¶¶ 241, 243.) *See* 18 U.S.C. § 2339(A) (including "currency or other financial securities [and] financial services" in definition of material support). This claim puts Mr. Alamoudi on notice that he is alleged to have provided financial material support to al Qaeda. Because the *Federal* complaint does not allege that Mr. Alamoudi had any role in directing an enterprise, however, the RICO claims against Mr. Alamoudi are dismissed. In sum, Mr. Alamoudi's motion to dismiss the *Burnett* complaint is granted; his motion to dismiss the *Federal* complaint is denied.

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C. Success Foundation[14]

[34] The Burnett Plaintiffs claim that Success Foundation is a sister company to Defendant IIRO and that it "sends money back and forth with the IIRO and IRO" and other sponsors of terror. (*Burnett* Compl. ¶ 235.) If given the opportunity to replead its allegations against Success, the Plaintiffs would allege that, in 1998, Success Foundation entered into a contract to act as an agent for Defendant Taibah, which has since been designated a global terrorist.

The complaint does not allege that Success Foundation knew the money it was transferring between IIRO and IRO would somehow assist al Qaeda, nor does it allege facts showing that Success Foundation knew the other unnamed organizations to which it transferred money were in the business of supporting terrorism. *See Boim II,* 291 F.3d at 1012 ("To hold the defendants liable for donating money without knowledge of the donee's intended criminal use of the funds would impose strict liability. Nothing in the language of the statute or its structure or history supports that formulation."). The *Burnett* complaint is against Success Foundation is dismissed without prejudice.

D. Wa'el Jalaidan

[35] For the reasons the Court found that it has personal jurisdiction over Mr. Jalaidan, the Court finds the Plaintiffs have stated a claim for relief against him. Plaintiffs have alleged facts, that if true, would be sufficient to prove that he knowingly provided material support to al Qaeda in the form of financial and logistical support. *See* 18 U.S.C. § 2339(A) (including ***569** "currency or other financial securities, financial services, ... weapons, [and] personnel" in definition of material support). The *Federal* complaint does not allege that Jalaidan directed an enterprise and the RICO claim is dismissed. Wa'el Jalaidan's motions to dismiss the *Ashton, Burnett,* and *Federal* complaints are denied

E. IIRO

[36] Similarly, for the reasons the Court found that Plaintiffs made a prima facie demonstration that IIRO has purposefully directed its activities at the United States, the Court finds they have stated a claim under the ATA in that IIRO has allegedly funded al Qaeda training camps in Afghanistan, supported al Qaeda guest houses, and been involved in other terrorist attacks and plots. *See* 18 U.S.C. § 2339(A) (including "currency or other financial securities, financial services, ... weapons, [and] personnel" in definition of material support). IIRO's motions to dismiss the *Ashton, Burnett,* and *Federal* complaints are denied.

F. Rabita Trust

[37] Rabita Trust moves to dismiss the complaints against it for failure to state a claim. These motions are denied without prejudice until this Court determines whether it has personal jurisdiction over Rabita Trust.

G. SAAR Network Defendants[15]

1. Entities

The *Burnett* and *Ashton* complaints' allegations against the SAAR Network entities are substantially similar to one another.[16] Paragraph 267 of the *Burnett* complaint and paragraph 339 of the *Ashton* complaint both state:

> Co-conspirators, material sponsors, and/or aiders and abettors of the SAAR Network include Defendants ... African Muslim Agency, ... Grove Corporate, Inc., Heritage Education Trust, International Institute of Islamic Thought, Mar–Jac Investments, Inc., Mar–Jac Poultry, Inc., ... Reston Investments, Inc., ... Safa Trust, ... and York Foundation, all located doing business or registered to do business in the United States.

In support of their claims against these Defendants, Plaintiffs rely primarily on their allegations against the "SAAR Foundation and network." (*See Burnett* Compl. ¶¶ 261–67; *Ashton* Compl. ¶¶ 333–39.) The SAAR Foundation, allegedly a financial sponsor of terror, was formed in the 1970s by a group of Muslim scholars and scientists. (*Burnett* Compl. ¶ 261; *Ashton* Compl. ¶ 333.) It was incorporated in Virginia in 1983 and dissolved in December 2000. (*Burnett* Compl. ¶ 261; *Ashton* Compl. ¶ 333.) Its largest donor is the al Rajhi family of Saudi Arabia. (*Burnett* Compl. ¶ 261; *Ashton* Compl. ¶ 333.)

The complaints claim that over one hundred "affiliated organizations" are registered or are doing business at one of the SAAR Foundation's addresses in Herndon, Virginia, but many "do not maintain a physical presence

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at that address, or elsewhere." ***570** (*Burnett* Compl. ¶ 262; *Ashton* Compl. ¶ 334.) The complaints further allege that many of the "SAAR Network" organizations' offices in Herndon were raided in March 2002 as part of Operation Greenquest to investigate "potential money laundering and tax evasion activities and their ties to terrorist groups such as ... al Qaeda as well as individual terrorists ... (including) Osama bin Laden." (*Burnett* Compl. ¶ 263; *Ashton* Compl. ¶ 335.) As noted above, Plaintiffs claim that the entity Defendants are among numerous co-conspirators, material sponsors, and/or aiders and abettors of the SAAR Network. (*Burnett* Compl. ¶ 267; *Ashton* Compl. ¶ 339.) The Plaintiffs also refer the Court to their allegations regarding charity sponsors of terror. (*See, e.g., Burnett* Compl. ¶¶ 150–53 (alleging, for example, that charity Defendants "are used as terrorist fronts, to mask money transfers and provide cover for terrorist operatives").) Additionally, the *Ashton* complaint claims that IIIT received its "operating expenses" from SAAR and "in turn financed two Florida charitable organizations accused of being cells for Islamic Jihad in Florida." (*Id.* ¶ 579.)

Unlike the SAAR Network entities whose motions to dismiss the *Federal* complaint the Court considered in its previous opinion and order, *see Terrorist Attacks I,* 349 F.Supp.2d at 822–23, these Defendants do not dispute that this Court has personal jurisdiction over them. Although each of these moving Defendants filed a separate motion to dismiss, their arguments in favor of dismissal are similar.[17] They argue that, even "assum[ing] that plaintiffs have stated a claim against the 'SAAR Network,' " (*see, e.g.,* African Muslim Agency's Mem. in Supp. Mot. to Dismiss at 3, n.1) the complaints must be dismissed because they contain only conclusory allegations that they are "co-conspirator[s], material sponsor[s], and/or aider[s] and abettor[s] of the SAAR Network." (*Burnett* Compl. ¶ 267; *Ashton* Compl. ¶ 339.) Further, they argue that the complaints must be dismissed because they do not allege that they donated any money improperly, or with the knowledge that it would be given to Osama bin Laden, al Qaeda, or to any other charity allegedly funneling money to terrorists.

[38] Plaintiffs offer the legal conclusion that the SAAR Network entities conspired with the SAAR Network. These Defendants, however, have no notice of the factual grounds on which Plaintiffs' claims of conspiracy are based. *See Jackson,* 372 F.3d at 1271 (explaining *Swierkiewicz* does not permit bare conclusory allegations without notice of the factual grounds on which they purport to be based); *see also* Bodner v. Banque Paribas, 114 F.Supp.2d 117, 125 (E.D.N.Y.2000) (noting the Second Circuit "has dismissed complaints which plead conspiracy in vague or conclusory terms and which do not allege specific instances of misconduct in furtherance of the conspiracy"); *Ying Jing Gan v. City of New York,* 996 F.2d 522, 534 (2d Cir.1993) (explaining that on a Rule 12(b)(6) motion, "legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness") (internal quotations omitted)). The *Burnett* complaint against African Muslim Agency, Grove Corporate, Heritage Education Trust, International Institute of Islamic Thought, Mar–Jac Investments, Mar–Jac Poultry, Reston Investments, Safa Trust, ***571** and York Foundation is therefore dismissed without prejudice. For the same reasons, the *Ashton* complaint against Mar–Jac Poultry is dismissed without prejudice.

[39] The *Ashton* complaint alleges one action by IIIT in support of its claims—that it allegedly financed two charitable organizations in Florida accused of being Islamic Jihad cells. The complaint does not allege that IIIT knew these charities were Islamic Jihad cells or whether and how these cells participated in or contributed to al Qaeda's agenda of terror. *See Boim II,* 291 F.3d at 1011–12 (making donations to an alleged terrorist group, without "knowledge of and intent to further payee's violent criminal acts," cannot sustain cause of action). Accordingly, the *Ashton* complaint against IIIT is dismissed without prejudice.

[40] In support of the claim that Mar–Jac Poultry is a material sponsor of terrorism, Plaintiffs allege two acts: first, that it donated money to African Muslim Agency, which the Plaintiffs claim was later "laundered," and second, that it donated money to unnamed SAAR Network entities, which was later forwarded to al Qaeda. (*See* Federal RICO Statement Applicable to SAAR Network Entities at 5(f) and Ex. A.) The RICO claim against Mar–Jac Poultry is dismissed because it is not alleged that Mar–Jac had any role in directing an enterprise, *see Redtail Leasing, Inc.,* 1997 WL 603496, at *5. The *Federal* complaint does not provide Mar–Jac Poultry with notice as to how it could be liable for the terrorist attacks. *See Boim II,* 291 F.3d at 1012 ("To hold the defendants liable for donating money without knowledge of the donee's intended criminal use of the funds would impose strict liability. Nothing in the language of the statute or its structure or history supports that formulation."). Mar–Jac's motion to dismiss the *Federal* complaint is therefore granted.

2. Executives

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[41] Taha Al–Awani, Muhammad Ashraf, M. Omar Ashraf, M. Yaqub Mirza, and Iqbal Unus are SAAR Network executives who are mentioned once in the *Federal* complaint in a long list of Defendants who allegedly "have aided and abetted, conspired with, and provided material support and resources to, defendant al Qaida and/or affiliated FTOs, associations, organizations or persons, as described herein." (*Federal* Compl. ¶ 66.) The complaint does not include any other allegations against these Defendants.

The *Federal* complaint alleges that Jamal Barzinji, another SAAR Network executive who moves to dismiss the complaint, is a Saudi national who, "through his various for-profit enterprises and involvement with charities and individuals operating within al Qaida's infrastructure, has long provided material support and resources to al Qaida." (*Federal* Compl. ¶¶ 490–91.) Barzinji has served as a board member of, or been associated with, several SAAR Network entities, including IIIT, WAMY, Safa Trust, Mar–Jac Poultry, and SAAR Foundation. *Id.* ¶ 490 (claiming that while he was the President of Safa Trust, he "held authority over eighteen bank accounts"). He is a business associate of the designated terrorist Yousef Nada. (*Id.*) According to unnamed federal authorities, Barzinji "committed and conspired to: transit money internationally for the purpose of promoting offenses against foreign nations involving murder or the destruction of property by means of explosive, fire, kidnapping or extortion ...; provide material support or resources to foreign terrorist organizations ...; and provide material support or conceal or disguise the source of ownership of material support ***572** intended for use in preparation for or in carrying out a terrorist act." (*Id.*)

The RICO statement provides additional associations between each of these SAAR Network executives and the SAAR Network. (*See Federal* RICO Statement Applicable to the SAAR Network Executives at Ex. A (alleging in their roles as executives of SAAR Network entities, each of these Defendants committed multiple acts of conspiracy to commit multiple crimes).) Specifically, Taha Al–Alwani was President of IIIT and an officer of Heritage Education Trust; Muhammad Ashraf was an officer and/or director of Sterling Investment Group, Sterling Charitable Gift Fund, and York Foundation; M. Omar Ashraf was an officer and/or director of Grove Corporate Plaza, Mar–Jac Investments, and Sterling Charitable Gift Fund; Yaqub Mirza served as an officer and/or director of African Muslim Agency, Mar–Jac Investments, Mar–Jac Poultry, Reston Investments, SAAR Foundation, Safa Trust, where he was the principal signatory on Safa Group checks, and York International; Iqbal Yunus was a director of Child Development Foundation, a SAAR Network entity, and was associated with Sterling Charitable Gift Fund, and Sterling Management Group; finally, Jamal Barzinji was president of Safa Trust and a director of Mar–Jac Poultry, Reston Investments, IIIT, and Safa Trust. (*Id.* at 5(f) and Ex. A.)

The complaint does not state a claim for relief against Taha Al–Awani, Muhammad Ashraf, M. Omar Ashraf, M. Yaqub Mirza, or Iqbal Unus on a civil RICO theory or under the ATA. Reading the complaint as a whole and considering the overlap of executives among the SAAR Network entities, the complaint does not adequately provide these Defendants with notice as to how they provided material support to al Qaeda terrorists. *See Boim II,* 291 F.3d at 1023 (explaining a claim under the ATA must include allegation that defendant knew about terrorists' illegal activities, defendant wanted to help those activities succeed, and defendant engaged in an act of helping). The *Federal* complaint against Taha Al–Awani, Muhammad Ashraf, M. Omar Ashraf, M. Yaqub Mirza, and Iqbal Unus is dismissed without prejudice.

[42] [43] Jamal Barzinji controlled several bank accounts. (*Federal* Compl. ¶ 490.) He has allegedly transmitted money internationally for terrorist purposes. (*Id.*) He allegedly made these transfers to support al Qaeda. (*Id.* at ¶¶ 490–91.) The *Federal* Plaintiffs do not allege that Mr. Barzinji participated in the operation or management of their claimed RICO enterprise, and the RICO claim against him is dismissed. *Reves,* 507 U.S. at 179, 113 S.Ct. 1163. But Mr. Barzinji does have sufficient notice of the claims against him regarding his alleged provision of material support in the form of financial transactions to al Qaeda. *See* 18 U.S.C. § 2339(A) (including provision of "currency or other financial securities [and] financial services" in definition of material support) Accordingly, his motion to dismiss the *Federal* complaint is denied.

IV. NCB's Motion for Reconsideration

In deciding NCB's motions to dismiss the *Ashton* and *Burnett* complaints, the Court ruled that NCB's status as a foreign sovereign for purposes of immunity under the FSIA was unclear. It also questioned whether it had personal jurisdiction over NCB. The Court ordered limited jurisdictional discovery on both issues. *Terrorist Attacks I,* 349 F.Supp.2d at 792, 820. In light of the possible lack of subject matter and personal jurisdiction, the Court refrained from deciding NCB's motion to dismiss for failure to state a claim. NCB ***573** moves for

reconsideration of those decisions.

A. Standard

[44] [45] A motion for reconsideration is appropriate where a court overlooks "controlling decisions or factual matters that were put before it on the underlying motion ... and which, had they been considered, might have reasonably altered the result before the court." *Range Road Music, Inc. v. Music Sales Corp.,* 90 F.Supp.2d 390, 392 (S.D.N.Y.2000); *see also Shrader v. CSX Transp. Inc.,* 70 F.3d 255, 257 (2d Cir.1995) ("The standard for granting a motion [for reconsideration] is strict, and ... will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked...."). A motion for reconsideration may also be granted to "correct a clear error or prevent manifest injustice." *Doe v. New York City Dep't of Soc. Servs.,* 709 F.2d 782, 789 (2d Cir.1983).

B. The Court Will Consider NCB's Personal Jurisdiction Defense First

NCB offers two bases for reconsideration. First, NCB argues that even if the Court becomes assured of its subject matter and personal jurisdiction over NCB, Plaintiffs' claims are doomed because the Court dismissed similar claims against Al Rajhi Bank, Saudi American Bank, and Arab Bank. NCB contends that *Center for Reproductive Law & Policy v. Bush,* 304 F.3d 183, 194–95 (2d Cir.2002), supports its theory that the Court does not need to establish jurisdiction over NCB because the Court's dismissal of other Saudi banks "foreordains" NCB's dismissal on 12(b)(6) grounds. Alternatively, NCB urges the Court to limit this litigation's intrusion on Saudi Arabia and postpone resolution of its FSIA immunity defense until after the personal jurisdiction question is resolved.

The *Ashton* and *Burnett* Plaintiffs argue that the Court should not consider NCB's reliance on *Bush* because it was not raised in NCB's original motion to dismiss. Moreover, they are adamant that jurisdictional questions must be resolved first. *See Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94–95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) ("The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception.") (internal citation and quotations omitted). And in Plaintiffs' view, the subject matter jurisdiction question must be resolved before the Court addresses personal jurisdiction. *See Reiss v. Societe Centrale Du Groupe Des Assurances Nationales,* 235 F.3d 738, 746 (2d Cir.2000) ("The initial question to be answered in this case is not whether there is personal jurisdiction within the meaning of the New York [C.P.L.R.] but whether there is subject matter jurisdiction within the meaning of the [FSIA]."). Plaintiffs submit that it would be inefficient to separate the personal jurisdiction discovery from the FSIA discovery since the two inquiries are related. Finally, Plaintiffs argue that the Court's rulings on the other Saudi banks' Rule 12(b)(6) motions cannot apply to NCB because the allegations against the various banks are not identical.

In *Bush,* following the Supreme Court's instructions in *Steel Co.,* the district court dismissed the case for lack of subject matter jurisdiction after finding plaintiffs lacked standing to sue. On appeal, the Second Circuit found the case "exceptional," because twelve years earlier it had "entertained and rejected, on the merits, the same constitutional challenge to the provision at issue." *Bush,* 304 F.3d at 186; ***574** *see also Planned Parenthood Fed. of Am. v. Agency of Int'l Devl.,* 915 F.2d 59 (2d Cir.1990) (rejecting same constitutional challenge to same governmental provision). It explained two exceptions to the general rule that courts "ordinarily ... are not to assume the existence of jurisdiction in favor of reaching an 'easier' merits issue." *Bush,* 304 F.3d at 193 (quoting *Fidelity Partners, Inc. v. First Trust, Co. of N.Y.,* 142 F.3d 560, 565 (2d Cir.1998)).

The only exception relevant here is "in those 'particular circumstances' where the outcome on the merits has been 'foreordained' by another case such that the 'jurisdictional question could have no effect on the outcome,' provided the court 'does not use the pretermission of the jurisdictional question as a device for reaching a question of law that otherwise would have gone unaddressed.' " *Bush,* 304 F.3d at 194 (quoting *Steel Co.,* 523 U.S. at 98, 118 S.Ct. 1003). The exception stems from *Secretary of Navy v. Avrech,* 418 U.S. 676, 94 S.Ct. 3039, 41 L.Ed.2d 1033 (1974), in which the Supreme Court dismissed a constitutional challenge to a governmental provision on the merits before reaching the jurisdiction question because the Court had earlier rejected a similar constitutional challenge to the same provision in *Parker v. Levy,* 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974). *See Bush,* 304 F.3d at 194 (describing *Avrech* and *Parker*). Accordingly, in *Bush,* the Second Circuit skipped the initial-and "novel"—standing question because that analysis would have been rendered "advisory" by "a controlling decision

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of this Court [that] has already entertained and rejected the same constitutional challenge to the same [governmental] provision." *Id.* at 195 (limiting holding to constitutional challenges to governmental provisions).

NCB's reliance on *Bush* cannot prevail here. The exception relied on in *Bush* is limited to constitutional challenges to governmental provisions. *Bush,* 304 F.3d at 195; *see also Steel Co.,* 523 U.S. at 99, 118 S.Ct. 1003. Here, the merits of NCB's liability for the attacks of September 11 do not present a constitutional challenge to a governmental provision such that skipping the jurisdiction question would be appropriate.

In its alternative argument for reconsideration, NCB requests that the Court postpone resolution of the subject matter jurisdiction question posed by the FSIA until NCB's personal jurisdiction defense is resolved. NCB argues that such a course would lead to its quicker dismissal from the litigation and would limit the intrusion into Saudi affairs since personal jurisdiction discovery would involve only NCB's contacts with the United States and not Saudi Arabia's relationship to NCB.

The Supreme Court and Second Circuit agree that there are certain circumstances in which it is appropriate to give priority to the personal jurisdiction inquiry. *See Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 578, 588, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999) (holding "there is no unyielding jurisdictional hierarchy ... [and] there are circumstances in which a district court appropriately accords priority to a personal jurisdiction inquiry" and finding no abuse of discretion where a court resolves a straightforward personal jurisdiction question before a novel subject matter jurisdiction question); *Cantor Fitzgerald v. Peaslee,* 88 F.3d 152, 155 (2d Cir.1996) (upholding district court's decision to dismiss for lack of personal jurisdiction before considering whether it had subject matter jurisdiction and finding "[o]n some occasions ... considerations of judicial economy and restraint may persuade the court to avoid a difficult question of subject-matter jurisdiction when the case may be disposed of on a simpler ***575** ground"). Further, deference to foreign sovereigns under the FSIA "need not imply priority of immunity determination.... If one (or more) of the other jurisdictional defenses hold out the promise of being cheaply decisive, and the defendant wants it decided first, it may well be best to grapple with it (or them) first." *In re Minister Papandreou,* 139 F.3d 247, 254 (D.C.Cir.1998).

[46] Here, the Court finds that the personal jurisdiction issue raised by NCB is "straightforward" when compared to the more "difficult" subject matter jurisdiction question posed by NCB's status within the Kingdom of Saudi Arabia. *See Ruhrgas,* 526 U.S. at 588, 119 S.Ct. 1563; *see also Terrorist Attacks I,* 349 F.Supp.2d at 789–792 (analyzing NCB's status as a foreign sovereign). Additionally, NCB acknowledges that personal jurisdiction discovery will only involve it, its relationship to the Kingdom of Saudi Arabia is sufficiently remote that an inquiry into NCB's contacts with the United States will not intrude on the inner workings of the Kingdom's government. Finally, discovery regarding NCB's FSIA defense would necessarily subject the Kingdom to discovery, which the Court is hesitant to do unnecessarily. *See First City, Texas–Houston, N.A. v. Rafidain Bank,* 150 F.3d 172, 176 (2d Cir.1998); *see also Arriba Ltd. v. Petroleos Mexicanos,* 962 F.2d 528, 534 (5th Cir.1992) (recommending that "discovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination").

For all the foregoing reasons, the Court reconsiders its order regarding simultaneous subject matter and personal jurisdiction discovery. *See Shrader,* 70 F.3d at 257 ("[I]n light of [defendant's] introduction of additional relevant case law ... we cannot say that reconsider[ation is] an abuse of discretion."). Further inquiry into NCB's status as a foreign sovereign is postponed until the parties have completed their personal jurisdiction discovery and this Court has determined whether it has personal jurisdiction over NCB. *See Ruhrgas,* 526 U.S. at 588, 119 S.Ct. 1563; *In re Arbitration Between Monegasque De Reasurrances S.A.M.,* 311 F.3d 488, 498 (2d Cir.2002) (noting "dismissal for want of personal jurisdiction is independent of the merits and does not require subject-matter jurisdiction") (quoting *In re Minister Papandreou,* 139 F.3d at 255–56).

V. Conclusion

For the reasons explained above, SHC's motion to dismiss the *Ashton, Burnett,* and *Federal* complaints for lack of subject matter jurisdiction is granted. Prince Salman's motion to dismiss the *Ashton, Burnett,* and *Federal* complaints for lack of subject matter and personal jurisdiction is granted. Prince Naif's motion to dismiss the *Ashton, Burnett,* and *Federal* complaints for lack of subject matter and personal jurisdiction is granted. Rabita Trust's motions to dismiss the *Ashton, Burnett,* and *Federal* complaints are denied without prejudice. Wa'el Jalaidan's motions to dismiss the *Ashton, Burnett,* and *Federal* complaints are denied, but the RICO, TVPA, negligence, and *Federal* intentional tort claims against him are dismissed. IIRO's motions to dismiss the *Ashton,*

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Burnett, and *Federal* complaints are denied, but the RICO, TVPA, negligence, and *Federal* intentional tort claims against it are dismissed. Tarik Hamdi's motions to dismiss the *Burnett* and *Federal* complaints are denied, but the RICO, TVPA, negligence, and *Federal* intentional tort claims against him are dismissed. Abdulrahman Alamoudi's motion to dismiss the *Burnett* complaint is granted; his motion to dismiss the *Federal* complaint is ***576** denied, but the RICO, TVPA, intentional tort, and negligence claims are dismissed. Success Foundation's motion to dismiss the *Burnett* complaint is granted. The motions by African Muslim Agency, Grove Corporate, Heritage Education Trust, IIIT, Mar–Jac Investments, Reston Investments, Safa Trust, and York Foundation to dismiss the *Burnett* complaint are granted. IIIT's motion to dismiss the *Ashton* complaint is granted. Mar–Jac Poultry's motions to dismiss the *Burnett, Ashton,* and *Federal* complaints are granted. The motions to dismiss the *Federal* complaint by Taha Al–Awani, Muhammad Ashraf, M. Omar Ashraf, M. Yaqub Mirza, and Iqbal Unus are granted. Jamal Barzinji's motion to dismiss the *Federal* complaint is denied, but the RICO, TVPA, intentional tort, and negligence claims against him are dismissed. National Commercial Bank's motion to reconsider the Court's January 18 opinion and order is granted to the extent that it requests the Court to consider its personal jurisdiction defense before resolving the FSIA issue.

So ordered.

All Citations

392 F.Supp.2d 539, 10 A.L.R. Fed. 2d 789

Footnotes

1 SHC moves to dismiss the *Ashton, Burnett, Federal, Barrera,* and *Salvo* complaints. The Court consolidated *Barrera v. al Qaeda Islamic Army,* 03 Civ. 7038, with *Ashton* on December 6, 2004. Similarly, at Plaintiffs' request, the Court consolidated *Salvo v. al Qaeda Islamic Army,* 03 Civ. 5071, with *Burnett* on August 16, 2005.

2 Prince Salman moves to dismiss the *Ashton, Burnett,* and *Federal* complaints.

3 Prince Naif moves to dismiss the *Ashton, Burnett,* and *Federal* complaints.

4 The French Interior Minister named one charity, the World Islamic League, during his meeting. Plaintiffs claim this is another name for the Muslim World League.

5 Plaintiffs bring the Court's attention to *Mwani v. bin Laden*, 417 F.3d 1 (D.C.Cir.2005), in which the D.C. Circuit found that Osama bin Laden and al Qaeda were subject to personal jurisdiction under Rule 4(k)(2) because they had "engaged in unabashedly malignant actions directed at and felt in this forum." *Id*. at 13 (citing, among other examples, bin Laden's and al Qaeda's orchestration of the Nairobi embassy bombing and the 1993 World Trade Center bombing, their plot to bomb various landmarks in New York City, their fatwas against Americans, the criminal indictment against them arising from the Nairobi attack, and the conclusions of the 9/11 Commission). As a result, their "decision to purposefully direct their terror at the United States, and the fact that the plaintiffs' injuries arose out of one of those terrorist activities, should suffice to cause the defendants to 'reasonably anticipate being haled into' an American court." *Id*. at 14. In light of the level of bin Laden's and al Qaeda's unquestionably direct involvement in the Nairobi attack, Mwani supports this Court's conclusion that a defendant's actions must be personal or direct so that the defendant has fair warning that his activities could subject him to personal jurisdiction in the United States. *Id.*

6 Rabita Trust moves to dismiss the *Ashton, Burnett,* and *Federal* complaints.

7 Certain Defendants have been designated Specially Designated Global Terrorists ("SDGTs") pursuant to Executive Order 13224. In response to the attacks of September 11, President Bush issued Executive Order 13224 on September 23, 2001, pursuant to the authorities of the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq.,* the National Emergencies Act, 50 U.S.C. § 1601 *et seq.,* United Nations Participation Act of 1945, as amended, 22 U.S.C. 287(c), and 3 U.S.C. § 301. The Secretaries of State and Treasury, in consultation with each other and the Attorney General, may designate individuals or entities if they determine the individual or entity has committed or poses the risk of committing acts of terrorism, or are owned or controlled by terrorists, or assist in or sponsor terrorism. As a result, the property and interests of the SDGT that come within the possession or control of U.S. persons are blocked. The process is intended to deter contributions to designated persons and entities and

heighten public awareness regarding links to terrorism. *See* Executive Order 13224 Fact Sheet *available at* http://www.state.gov/s/ct/rls/fs/2002/16181.htm.

8 Wa'el Jalaidan moves to dismiss the *Ashton, Burnett,* and *Federal* complaints.

9 At oral argument Plaintiffs alleged and Defendant heard for the first time, that Saudi Arabia and the United Nations have also designated him a terrorist.

10 In reaching this conclusion, the Court did not consider the supplemental material that the *Burnett* and *Federal* Plaintiffs submitted in opposition to Mr. Jalaidan's motions to dismiss. (*See* Letter from Sean P. Carter to Court of June 23, 2005; Letter from Jodi Westbrook Flowers to Court of June 24, 2005.)

11 IIRO moves to dismiss the *Ashton, Burnett,* and *Federal* complaints.

12 Tarik Hamdi moves to dismiss the *Burnett* and *Federal* complaints.

13 Abdulrahman Alamoudi moves to dismiss the *Burnett* and *Federal* complaints.

14 Success Foundation moves to dismiss the *Burnett* complaint.

15 Certain of these Defendants object to the label "SAAR Network Defendants," arguing there is no such entity and that, even if there were, Plaintiffs cannot agree as to which Defendants are included in the network. The Court refers to these Defendants under this label solely because Plaintiffs have so-identified these Defendants in their complaints.

16 African Muslim Agency, Grove Corporate, Heritage Education Trust, IIIT, Mar–Jac Investments, Mar–Jac Poultry, Reston Investments, Safa Trust, and York Foundation move to dismiss the *Burnett* complaint. IIIT and Mar–Jac Poultry also move to dismiss the *Ashton* complaint. Mar–Jac Poultry moves to dismiss the *Federal* complaint as well.

17 The *Burnett* Plaintiffs filed one opposition brief in response to all of the SAAR Network entities' motions, except Mar–Jac Poultry. The *Ashton* Plaintiffs filed a single opposition brief in response to IIIT's and Mar–Jac Poultry's motions to dismiss. The *Burnett* and *Federal* Plaintiffs filed separate briefs opposing Mar–Jac Poultry's motions to dismiss.

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United States District Court
Southern District of New York

VIRGINIA L. GIUFFRE,

Plaintiff, CASE NO:

v.

ALAN DERSHOWITZ,

Defendant.

_____ /

COMPLAINT

Boies Schiller Flexner LLP

Plaintiff, VIRGINIA L. GIUFFRE, formerly known as Virginia Roberts ("Roberts"), for her Complaint against Defendant, Alan Dershowitz ("Dershowitz") avers upon personal knowledge as to her own acts and status and upon information and belief and to all other matters:

NATURE OF THE ACTION

1. This suit arises out of Defendant's defamatory statements of and concerning Plaintiff.

2. During 2000-2002, beginning when Plaintiff was 16, Plaintiff was the victim of sex trafficking and abuse by convicted sex offender Jeffrey Epstein.

3. Epstein's trafficking scheme involved recruiting young girls, often by claiming they would be paid $200 for simply providing a massage to a wealthy billionaire. The young girl would then be brought up to Epstein's bedroom where Epstein would be on a massage table; Epstein would then sexually abuse the girl. This same pattern was repeated numerous times with numerous children.

4. "From between 1999 – 2007, Jeffrey Epstein sexually abused more than 30 minor girls…in his mansion in Palm Beach Florida, and elsewhere in the United States and overseas… In addition to his own sexual abuse of the victims, Epstein directed other persons to abuse the girls sexually. Epstein used paid employees to find and bring minor girls to him. Epstein worked in concert with others to obtain minors not only for his sexual gratification, but also for the sexual gratification of others." United States District Court Judge Marra February 21, 2016 Summary Judgement Order at 2, Case No.: 9:08-cv-80786 (internal citations omitted). One of the persons with whom Epstein acted in concert was Dershowitz.

5. Like other minor children who came before and after her, Plaintiff was initially recruited to provide massages, and thereafter to engage in a variety of sexual acts, for Epstein.

Plaintiff was required to be on call for Epstein for sexual purposes and frequently traveled with him both nationally and internationally. Plaintiff was regularly abused by Epstein and was lent out by Epstein to others for sexual purposes.

6. Defendant Dershowitz was Epstein's attorney, close friend, and co-conspirator. Dershowitz was also a participant in sex trafficking, including as one of the men to whom Epstein lent out Plaintiff for sex.

7. When Epstein was arrested for sex trafficking in 2006, Dershowitz defended his friend and client by falsely attacking the veracity of his accusers, including calling the children whom Epstein had abused (and, in the case of Plaintiff, the Defendant himself had also abused), liars and prostitutes.

8. Despite his significant criminal activity, Epstein's criminal charges were resolved by a guilty plea to a single Florida state law charge and a non-prosecution agreement (a "NPA") with the U.S. Attorney for the Southern District of Florida. Unknown to the public and the victims at the time, Epstein's lawyers, including Dershowitz, were pressuring the Government to commit to the NPA without informing the victims. Epstein's multiple victims, including Roberts, were kept in the dark and told to be "patient" while Dershowitz participated in the drafting of the NPA and worked to protect Epstein and other "potential co-conspirators" (including himself) from prosecution.

9. On July 7, 2008, a challenge to the NPA was brought on behalf of two of Epstein's victims (not including Plaintiff) based on the fact that, contrary to the requirements of the Criminal Victims' Rights Act (the "CVRA"), the NPA had been concealed from Epstein's victims.

10. In December 2014, Roberts, who had not initially been part of the CVRA action, was asked to, and did, provide information to Plaintiffs' counsel in the CVRA case in which she discussed her sex trafficking by Epstein. On December 31, 2014, Plaintiff's counsel in the CVRA proceeding (Brad Edwards and Paul Cassell) filed a Motion Pursuant to Rule 21 for Joinder in the Action ("Joinder Motion") on behalf of Roberts. Ms. Roberts's joinder motion described how she had been sexually trafficked by Jeffrey Epstein and was forced to have sex with, among others, Alan Dershowitz.

11. Based on Plaintiff's December 2014 filing, Dershowitz, as he had previously done to Epstein's victims, publically and viciously attacked plaintiff's counsel in the CVRA actions, Brad Edwards and Paul Cassell. Dershowitz, in nationally televised news interviews, wrongfully claimed that Edwards and Cassell had engaged in unethical behavior warranting disbarment for filing the Joinder Motion that described Dershowitz's involvement with Epstein and Roberts. Edwards, who is a prominent attorney for sexually abused women and children, and Cassell who is a former United States District Court judge who left the bench to advocate for criminal victims, sued Dershowitz for defamation. Edwards and Cassell asserted that the factual allegations that Dershowitz had knowledge of and participated in Epstein's criminal conduct were entirely proper and well founded and that Dershowitz's statements about Edwards and Cassell were defamatory.

12. In April 2016 Dershowitz settled the Edwards and Cassell defamation claims against him. As a condition of the settlement, Dershowitz required that the financial terms of the settlement be kept confidential.

13. In November 2018, after conducting a lengthy investigation that involved interviewing over eighty (80) women, the Miami Herald published the first in a series of articles

exposing how Epstein and his lawyers had corrupted the legal system to obtain the NPA and referring to Dershowitz's sexual abuse of Roberts. Dershowitz's response on behalf of himself and his client and co-conspirator Epstein has been a desperate barrage of false and increasingly defamatory attacks on Roberts. The purpose and effect of these attacks has been to damage Robert's reputation and credibility and to try to intimidate her into silence.

14. Defendant's central assertion is that Roberts has committed perjury, and that in December 2014, Roberts and her attorneys hatched a scheme to falsely accuse Dershowitz of sex trafficking as part of a criminal attempt to extort a settlement from another party.

15. As Defendant and Epstein well knew, Dershowitz's assertion was false. Dershowitz and Epstein knew that Dershowitz had in fact had sex with Plaintiff. Dershowitz and Epstein also knew that Roberts's assertions about Dershowitz were not part of any criminal extortion plot. Indeed, Dershowitz and Epstein knew that Roberts had identified Dershowitz as a sexual predator years before December 2014.

16. Defendant's knowledge of the falsity of his attacks on Roberts have not, however, limited the scope or scale of those attacks.

17. Examples of Dershowitz's knowingly false and malicious defamatory statements made on behalf of himself and Epstein are:

(a) November 28, 2018: "the story was 100% flatly categorically made up" and "Roberts and her attorneys fabricated the assertion in order to get money from other powerful, wealthy people". (Exhibit 1, p. 8).

(b) December 1, 2018: "I never met Roberts; I never had sex with her; she simply made up the entire story for money". (Exhibit 2).

(c) December 2, 2018: "I was 'deliberately framed for financial reasons'"; Roberts made her claims about Dershowitz "in order to obtain money from a wealthy businessman and that Roberts had never previously included me among the people with whom she claimed to have had sex"; "one of Roberts' own lawyers has acknowledged in front of witnesses that Roberts claims against me are 'wrong' 'simply wrong'"; "I never met Roberts; I never had sex with her; she simply made up the entire story for money". (Exhibit 3).

(d) December 4, 2018: Plaintiff is a "certified, complete, total liar"; "I can prove conclusively that she made the whole thing up". At the same time Dershowitz claimed "that the FBI recognized the evidence showed he was not where she said he was". (Exhibit 4).

(e) December 5, 2018: "Roberts made up the accusations out of whole cloth in order to obtain millions of dollars from Leslie Wexner" and "there is evidence that directly proves I was framed. These include emails between Roberts and a journalist, a book manuscript by Roberts and a legal brief that are smoking guns showing that I was deliberately framed for financial reasons." (Exhibit 5).

(f) March 2, 2019: "My perjuring accusers are Virginia Roberts and Sarah Ransome [who reported that Epstein lent her out to Dershowitz for sex at the same time as Dershowitz was, at Epstein's request, representing Ransome as her lawyer]. Both have long records of lying". (Exhibit 6).

18. Dershowitz and Epstein knew Dershowitz's assertions about Roberts, including his assertions referenced in paragraph 17 above, were, and would be taken by persons who read and heard them to be, specific statements of fact.

19. Dershowitz has repeatedly, publically claimed that he wanted to have a trial that would determine the facts concerning his conduct. He said on national television that he would waive the statute of limitations so that Roberts could sue him for sex abuse. However, when Robert's counsel asked Dershowitz to do so, Dershowitz refused -- and continues to refuse.

20. Similarly, when Dershowitz was faced with an actual case brought by Edwards and Cassell which would have determined the veracity of Roberts' claims, Dershowitz settled to avoid that determination.

21. More recently, Dershowitz, perhaps believing that Roberts who is now living with her husband and children in Australia would not be prepared to engage in litigation, has again taken to claiming publically that he demands a trial on the question of whether Roberts committed perjury and made up her statements about him for money. For example on March 2, 2019: My "accusers are Virginia Roberts and Sarah Ransome…I hereby accuse my false accusers of committing the felony of perjury and challenge them to sue me for defamation." (Exhibit 6).

22. Mr. Dershowitz now has what he claims to have been looking for.

JURISDICTION AND VENUE

23. This is an action for damages in an amount in excess of the minimum jurisdictional limits of this Court.

24. This Court has jurisdiction over this dispute pursuant to 28 U.S.C. §1332 (diversity jurisdiction) in that Roberts and Dershowitz are citizens of different states and the amount in controversy exceeds seventy-five thousand ($75,000), exclusive of interest and costs.

25. This Court has personal jurisdiction over Defendant. Defendant resides in New York City; Defendant conducts regular business in New York City; and this action arose,

defamatory statements were made, and abuse occurred, within the Southern District of New York.

26. Venue is proper in this Court as (a) the cause of action arose within the jurisdiction of this Court and (b) Defendant resides within this District.

PARTIES

27. Plaintiff is an individual who is a citizen of the State of Florida and a resident of Australia.

28. Defendant Dershowitz is an individual who resides in the Southern District of New York at 2 Tudor City Place Apt. 10EN, New York, New York 10017.

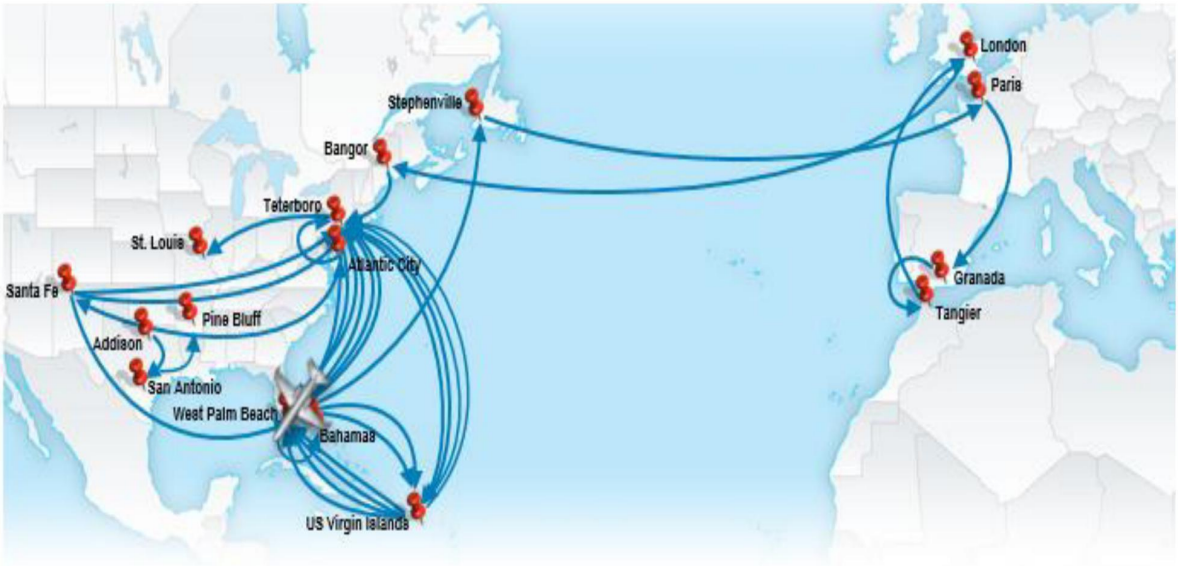
29. Jeffrey Epstein is an individual who resides in the Southern District of New York at 9 East 71st Street, New York, New York, 10021.

FACTUAL ALLEGATIONS

A. Epstein's Sex Trafficking Enterprise

30. Plaintiff became a victim of sex trafficking and repeated sexual abuse after being recruited by Ghislaine Maxwell and Jeffrey Epstein when Plaintiff was under the age of eighteen.

31. Between 2000 and 2002, Epstein sexually abused Roberts at numerous locations including his mansions in West Palm Beach, Florida, New Mexico, the Virgin Islands, and this District. Epstein also flew Roberts on his plane nationally and internationally numerous times when she was under the age of 18. Only portions of the flight logs of Epstein's private planes are yet known, and Epstein also flew Roberts frequently on commercial airlines to meet him and others. However, the chart below which shows Roberts' flights on Epstein's private plane from the limited logs that are available illustrates the international scope of Epstein's sex trafficking.



32. Between 1999 and 2007, with the assistance of numerous co-conspirators, Epstein abused more than thirty (30) minor underage girls, a fact confirmed by state and federal law enforcement.

33. After years of abuse, Epstein sent Roberts to Thailand in September 2002. One of Roberts' assignments from Epstein was to bring a young girl back to Epstein in the United States. Fearing for her life, and not wanting to subject another young girl to the abuse she was forced to endure, Roberts fled from Thailand to Australia to escape from Epstein.

B. <u>Dershowitz's Role with Epstein and Abuse of Plaintiff</u>

34. Dershowitz has been "a close friend of Mr. Epstein" for many years. (Exhibit 7). In 2003, Dershowitz said "I'm on my 20th book… The only person outside of my immediate family that I send drafts to is Jeffrey." "The Talented Mr. Epstein." *Vanity Fair* 2003. (Exhibit 8). Dershowitz also described Epstein as his friend "I would be interested in him [Epstein] as a friend if we had hamburgers on the boardwalk in Coney Island and talked about his ideas." "Vanity Fair Reminds US When Jeffrey Epstein Wasn't a Creep." *The Atlantic Wire*. June 21, 2011. Dershowitz frequently traveled with Epstein, including on Epstein's private plane. In

addition, Epstein's employees have confirmed that Dershowitz visited Epstein's Palm Beach and New York City mansions often, would stay overnight, and was present when the victims of Epstein's sex trafficking were there. Dershowitz also visited Epstein's other homes.

35. In addition to their close friendship, Dershowitz represented Epstein as his attorney. On or about December 2, 2018, Dershowitz stated that he is still Epstein's attorney (Exhibit 9).

36. During the time period that Roberts was being trafficked by Epstein she was forced to have sex with Alan Dershowitz. Roberts was forced to engage in sexual acts with Dershowitz in, among other locations, Epstein's mansion located at 9 East 71st Street, New York, New York 10021.

C. <u>The Arrest and Prosecution of Epstein</u>

37. Epstein ultimately pled guilty to procuring a minor for prostitution, and is now a registered sex offender.

38. In September 2007, Epstein entered into a Non-Prosecution Agreement ("NPA") in which the U.S. Attorney for the Southern District of Florida agreed not to prosecute Epstein for numerous federal sex crimes committed in that District.

39. In the NPA, the United States Attorney for the Southern District of Florida additionally agreed that it would not institute any federal criminal charges against any potential co-conspirators of Epstein.

40. Epstein flippantly referred to his sexual abuse of multiple minors, and the slap on the wrist he had received for it, in a 2011 interview with the New York Post: "Billionaire pervert Jeffrey Epstein is back in New York City – and making wisecracks about his just-ended jail stint for having sex with an underage girl. 'I am not a sexual predator, I'm an "offender,"' the

financier told The Post yesterday. "'It's the difference between a murderer and a person who steals a bagel,' said Epstein." February 25, 2011, New York Post "Billionaire Jeffrey Epstein: I'm a Sex Offender Not A Predator".

D. <u>The Criminal Victims' Rights Act Proceeding</u>

41. Rather than confer with the victims about the NPA, the U.S. Attorney's Office and Epstein, who was represented by Dershowitz at that time, agreed to a "confidentiality" provision in the Agreement barring its disclosure to anyone—including Epstein's victims. As a consequence, the victims were not told about the NPA.

42. On July 7, 2008, a young woman identified as Jane Doe No. 1, one of Jeffrey Epstein's victims (other than Roberts), filed a petition to enforce her rights under the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. ¶ 3771, alleging that the Government failed to provide her the rights promised in the CVRA with regard to the plea arrangement with Epstein.

43. On February 21, 2019, the Court found that the victims' rights had been violated and granted summary judgment in favor of the victims finding: "It was a material omission for the Government to suggest to the victims that they have patience relative to an investigation about which it had already bound itself not to prosecute." Order at 31. In its Order the Court acknowledged that: "Jeffrey Epstein sexually abused more than 30 minor girls". The Court also found: "Among other provisions, the NPA expanded immunity to any 'potential coconspirator' of Epstein's: 'In consideration of Epstein's agreement to plead guilty and to provide compensation in the manner described above, if Epstein successfully fulfills all of the terms and conditions of this agreement, the United States also agrees that it will not institute any criminal charges against any potential co-conspirators of Epstein, including but not limited to Sarah Kellen, Adriana Ross, Lesley Groff or Nadia Marcinkova… From the time the FBI began

investigating Epstein until September 24, 2007 – when the NPA was concluded – the Office never conferred with the victims about a NPA or told the victims that such an agreement was under consideration." Order at 2, 8.

E. Victims Refuse Silence

44. Ultimately, as a mother and one of Epstein's many victims, Roberts concluded that she should speak out about her sexual abuse experiences in hopes of helping others who had also suffered from sexual trafficking and abuse, and of possibly protecting future potential victims.

45. On December 23, 2014, Roberts incorporated an organization called Victims Refuse Silence, Inc., a Florida not-for-profit corporation.

46. Roberts intended Victims Refuse Silence to change and improve the fight against sexual abuse and human trafficking. The goal of her organization was, and continues to be, to help survivors surmount the shame, silence, and intimidation typically experienced by victims of sexual abuse, and to help others to escape becoming victims of sex trafficking.

F. Defendant Acted Maliciously to Defame, Discredit, and Intimidate Roberts

47. Dershowitz made his false and defamatory statements as set forth above on behalf of himself and on behalf of his co-conspirator and client Epstein, in the Southern District of New York and elsewhere, in a deliberate effort to maliciously discredit Roberts and silence her efforts to expose the sexual abuse she suffered. Dershowitz and Epstein did so with the purpose and effect of having others repeat such false and defamatory statements and thereby further damaged Roberts's reputation. Dershowitz and Epstein knew Dershowitz's statements were false.

48. Dershowitz made his statements to discredit Roberts in concert with Epstein and others, including Ghislaine Maxwell, one of Epstein's long-time procurers, as part of a conspiracy to discredit and try to silence Roberts. Epstein was particularly interested in discrediting and silencing Roberts because he feared a reopening of a federal criminal investigation of him.

49. Dershowitz made his statements pursuant to his conspiracy with Epstein and Maxwell maliciously as part of an effort to conceal sex trafficking crimes committed around the world by Epstein and other powerful persons.

50. Dershowitz and Epstein intended Dershowitz's false and defamatory statements set out above to be broadcast around the world and to intimidate and silence Roberts from making further efforts to expose sex crimes committed by Epstein and other powerful persons, including Dershowitz.

51. Dershowitz and Epstein intended their false statements to be specific statements of fact. Dershowitz's false statements were, as he and Epstein intended, broadcast around the world and were reasonably understood by those who heard them to be specific factual claims by Dershowitz that he had not had sex with Roberts, that Roberts was intentionally lying about having sex with Dershowitz, that Roberts committed the crime of perjury, that Roberts had committed the crime of extortion, and that Roberts had intentionally fabricated her assertions about Dershowitz to extort money from others.

52. Epstein also worked with other of his attorneys to attack Roberts' allegations, including in a false statement they made in a letter to the editor to the New York Times asserting: "The number of young women involved in the investigation has been vastly exaggerated, there

was no 'international sex-trafficking operation' and there was never evidence that Mr. Epstein 'hosted sex parties' at his home". (Exhibit 10).

G. Dershowitz's Lies

53. From the beginning, Dershowitz and Epstein have sought to hide their crimes behind a curtain of lies. In response to Roberts' description of Dershowitz's participation in Epstein's sex trafficking, Dershowitz began a series of intentional, outright lies designed to distance himself from Epstein, to cover up his own wrongdoing, and to discredit Roberts and intimidate her into silence.

54. Dershowitz's repeated lies are compelling evidence both of his lack of credibility and his guilt. Only a person seeking to conceal improper conduct would have engaged in the pattern of lies which has characterized Dershowitz's statements since his sex trafficking was revealed.

55. In attempt to conceal his relationship with Epstein, Dershowitz in January 2015 asserted that "my relationship with him was entirely professional. It is a total bum rap to say that I…was 'chummy' with him". (Exhibit 11). That was a lie, as Dershowitz and Epstein knew (*see*, e.g., paragraphs 34-35).

56. Both to conceal Dershowitz's relationship with Epstein, and to discredit Roberts, Dershowitz has repeatedly asserted that he was only at Epstein's residence once in Palm Beach, and that was with his family. However, Juan Alessi, a long time Epstein household employee, has confirmed that Dershowitz visited Epstein "pretty often. I would say at least four or five times a year" and that he would "typically" stay two or three days. Similarly, Alfredo Rodriguez who worked for Epstein approximately only six months confirmed that during that six months period Dershowitz visited Epstein twice.

57. Again, both to conceal his relationship with Epstein and to discredit Roberts, Dershowitz has repeatedly asserted that he was never in Epstein's residence in the presence of young women. As both Dershowitz and Epstein know, that assertion was also false. As Mr. Rodriguez has confirmed, there were "also young ladies in the house at the time he [Dershowitz] was there". Mr. Rodriguez also confirmed that "Mr. Dershowitz was there" when "women came to Mr. Epstein's home to give a massage". Mr. Rodriguez also confirmed that "Alan Dershowitz was at the house" with "the local Palm Beach girls" who he was "told to call masseuses", although he did not himself know whether or not Dershowitz personally received a massage.

58. Maria Farmer was an employee of Epstein responsible for "manning the front door at his New York mansion and keeping records of people who came to the home" (Exhibit 12, ¶ 2).

(a) Ms. Farmer "witnessed a number of school age girls coming to the house, some of the young girls would be wearing their school uniforms"…who "then would be escorted upstairs" (Exhibit 12, ¶ 3).

(b) Ms. Farmer was told these young girls "were interviewing for modeling positions" even though "it did not seem credible to me that these young girls were interviewing for modeling positions". (Exhibit 12, ¶ 3).

59. Ms. Farmer asserts that "Alan Dershowitz was an individual who came to visit Epstein at his New York mansion a number of times when I was working for Epstein. Dershowitz was very comfortable at the home and would come in and walk upstairs. On a number of occasions I witnessed Dershowitz at the NY mansion going upstairs at the same time there were young girls under the age of 18 who were present upstairs in the house" (Exhibit 12, ¶ 4).

60. Ms. Farmer, like other victims of, and witnesses to, Epstein and Dershowitz's sex trafficking and abuse has been subjected to attacks and intimidations. (Exhibit 12, ¶¶ 8-9). Her courageous testimony, together with the sworn testimony of victims such as Sarah Ransome and witnesses such as Mr. Alessi and Mr. Rodriguez , proves beyond any doubt that Dershowitz's claims that he was never present where Ms. Roberts was trafficked, and never in the presence of young girls, are a lie intended to cover up his culpability.

61. Again both to conceal his relationship with Epstein and to discredit Roberts, Dershowitz has repeatedly asserted that he has records that prove that it would have been "impossible" for him to be with Roberts because he was never in the same place and time as Roberts. As both Dershowitz and Epstein know, that too was a lie. The testimony of Epstein's household staff establishes that Dershowitz was repeatedly at Epstein's residence. Even Dershowitz's own selected, incomplete, and apparently revised, records demonstrate that Dershowitz was present at locations where Ms. Roberts was with Epstein.

62. Dershowitz's assertion that Roberts accused him of having sex with her only after her lawyers convinced her to do so in late 2014 is not only false, as both Dershowitz and Epstein knew, but thoroughly disproved by the record.

63. Roberts had identified Dershowitz as a participant in her sexual abuse at the time it occurred. She did so again in 2009. In 2010 Epstein's co-conspirators were repeatedly asked about Dershowitz. For example:

(a) Adriana Ross refused to answer on Fifth Amendment grounds whether "Alan Dershowitz stays at Jeffrey Epstein's house…when underage minor females have been in the bedroom with Jeffrey Epstein".

(b) Nadia Marcinkova refused to answer on Fifth Amendment grounds: "Alan Dershowitz is also somebody that you also know to have been at the house when L.M. was being sexually abused in Jeffrey Epstein's bedroom, correct?"

64. In 2011 Counsel for Edwards wrote Dershowitz:

(a) On August 23, 2011: "We…have reason to believe that you have personally observed Jeffrey Epstein in the presence of underage females".

(b) On September 7, 2011: "Multiple individuals have placed you in the presence of Jeffrey Epstein on multiple occasions and in various locations when Jeffrey Epstein was in the company of underage females subsequently identified as victims of Mr. Epstein's criminal molestations."

65. Dershowitz lied and stated that he had never flown on Jeffrey Epstein's plane with a young woman and always flew with his wife. (*Hala Gorani, CNN Live,* Jan. 5, 2015). However, even the limited publically available flight logs of Jeffrey Epstein's private plane demonstrate that Dershowitz flew often on Epstein's planes without his wife; with young women, including a Victoria's Secret model; Epstein's procurer Ghislaine Maxwell; and Sarah Kellen who was identified by the Government as Epstein's co-conspirator in his sex trafficking.

66. Dershowitz also lied by saying that he "never" got a massage from anybody: "I never got a massage from anybody. It's made up out of whole cloth." (*NY Daily News*, January 21, 2015). However, after it was revealed that Epstein's household staff identified Dershowitz as one of the recipients of "massages" at Epstein's Palm Beach mansion, Dershowitz changed his story and admitted he got a massage at Epstein's Palm Beach home but claimed: **"I kept my underwear on during the massage."** (*Local 10*, January 22, 2015).

67. Dershowitz lied and said he never saw any naked pictures of females in Epstein's Palm Beach home during his many visits, yet the police footage that was obtained from the search of Epstein's home proves that there were naked pictures of females throughout the home including in the common areas.

68. In a desperate attempt to deflect attention from his own misconduct, Dershowitz fabricated an extortion plot by Roberts and her lawyers. Dershowitz falsely told the media that he was being used as a pawn as part of a fanciful plan to extort money from a billionaire business mogul and colleague of Epstein. Dershowitz's claim was that he was framed in order to send a message to the billionaire that this is what would happen to the billionaire if the billionaire did not pay Roberts and her attorneys. As Dershowitz knew:

(a) No complaint was ever made against the billionaire.

(b) No money was either paid or demanded by or from the billionaire.

(c) Roberts' assertions about Dershowitz long predated the time of the alleged extortion plot.

69. Dershowitz also falsely claimed that Roberts' lawyer had told him that he had concluded that Roberts was "wrong" and "simply wrong" in accusing Dershowitz. Dershowitz, in violation of the canons of ethics and in at least one case in violation of state law, had surreptitiously tape recorded confidential settlement negotiations he had engaged in with Ms. Roberts' lawyer. Dershowitz then played and described excerpts from those tapes out of context to reporters to try to make it appear that Ms. Roberts' lawyer's hypothetical comments, and characterizations of Dershowitz's assertions, represented that lawyer's conclusions. As the sworn testimony (Exhibit 13) of Dershowitz's own lawyer, and the facts set forth below, demonstrate, Dershowitz's assertions about what Ms. Roberts' lawyer said are, again, false.

70. In May 2015 Dershowitz requested confidential settlement negotiations with Ms. Roberts' lawyers in which Dershowitz sought to convince Ms. Roberts lawyer that Ms. Roberts was mistaken, and that the person to whom Epstein had lent Ms. Roberts was Nathan Myhrvold, not Dershowitz. Dershowitz claimed that he had been at Epstein's home only once (and that he was there with his family); that he had never been in the vicinity of Epstein's island; that he had not been at Epstein's New York mansion; and that he had been at Epstein's New Mexico ranch only once for a few hours (again with his family). Dershowitz provided a summary of his whereabouts that purported to prove that his assertions were true.

71. Dershowitz was told that, based on what was shown in his summary, it would have been impossible for Ms. Roberts' assertions about him to be true, and that if his assertions proved out, Ms. Roberts counsel would undertake to convince her that she must have made a mistake.

(a) Dershowitz was also told, however, (i) that his assertions would have to be proven, (ii) that Ms. Roberts had always been very clear that she recalled having had sex with Dershowitz multiple times, and (iii) that everyone was convinced that Ms. Roberts was telling the truth as she recalled it.

(b) Dershowitz responded that he did not doubt that Ms. Roberts was telling the truth as she recalled it and that she would have no difficulty passing a lie detector test. He said he simply believed Ms. Roberts had made an honest mistake in confusing him with Nathan Myhrvold.

72. Following Dershowitz' presentations, Dershowitz's representations were investigated and repeatedly proven false.

(a) Dershowitz's alleged backup for his travel summary proved to be incomplete and in some instances apparently altered.

(b) Dershowitz's key claim that he had not stayed at Epstein's house was proven false, including by the testimony of Epstein's household employees Juan Alessi (*see* ¶ 56 above) and Alfredo Rodriguez (*see* ¶¶ 56-57 above) as well as the testimony of Sarah Ransome (Exhibit 14) and Maria Farmer (Exhibit 12).

(c) Dershowitz's claim that Ms. Roberts confused him with Nathan Myhrvold was tested by showing Ms. Roberts pictures of both. She was, and is, clear that it was Dershowitz, not Myhrvold, with whom she had sex.

(d) Dershowitz's claim he had never been on Epstein's plane without his wife was proven false by plane logs.

(e) Dershowitz's claim that he had never seen pictures of young females at Epstein's house was proven false by Palm Beach police and FBI reports.

(f) Dershowitz's claim that he had never been in the presence of young females was proven false by the testimony of Epstein's household employer (*see* ¶¶56-57) and of young women themselves (*see* Exhibit 14 [Ransome] and Exhibit 12 [Farmer].)

73. After Dershowitz's claimed proof of exonerating evidence collapsed, and the evidence of his guilt grew, Roberts' lawyer's told Dershowitz in writing that they "had discovered evidence inconsistent with some of [your] representations", that his travel "records were incomplete", and that he "should have settled the case when he had a chance".

74. Roberts' lawyer explicitly told Dershowitz that neither Roberts nor her lawyer would make any statement saying or implying that Roberts was mistaken in her charge that

Dershowitz participated in her sexual trafficking and abuse. In his public statements, Dershowitz conspicuously omits any reference to the statements by Roberts' lawyers after they had investigated his representations and concluded that they were false.

75. Faced with the mounting evidence of his guilt, Dershowitz abandoned his attempt to get Roberts or her lawyer to concede a mistake or that Roberts had been wrong, and desperately sought even a suggestion that an error was "possible".

76. In December 2015 Ms. Roberts' counsel again told Mr. Dershowitz that "Virginia is adamant about her current recollection" and that neither Ms. Roberts nor her counsel believed she was mistaken in identifying Mr. Dershowitz as one of the men to whom Epstein had lent her out for sex. In response, Mr. Dershowitz did not claim that Ms. Roberts lawyers had told him that they did not believe her.

77. Instead, the morning of December 9, 2015, Mr. Dershowitz pleaded: "David, Have we given up on a mutually acceptable statement from VR or you. Let's keep trying. We are not that far apart." (Exhibit 15). When Ms. Roberts lawyer did not immediately respond, Mr. Dershowitz wrote later the same day:

> "We should be aiming at a short simple statement such as: "The events at issue occurred approximately 15 years ago when I was a teenager. Although I believed then and continued to believe that AD was the person with whom I had sex, recent developments raise the possibility that this may be a case of mistaken identification." (Exhibit 15).

Mr. Dershowitz went on to write: "It would be acceptable if the statement came from you rather than her, if she prefers." (*Id.*)

78. Wholly absent at this point was any assertion by Mr. Dershowitz that Ms. Roberts was lying, or that she made up her charge as part of an extortion claim, or that after investigating his alleged evidence Ms. Roberts' lawyer did not believe her. On the contrary, Mr. Dershowitz expressly recognized that Ms. Roberts' belief was an honest one. All Mr. Dershowitz was pleading for was an acknowledgement that there was a "possibility" that there "may be" a case of mistaken identification. Even that plea was rejected by Ms. Roberts and her lawyers as misleading.

79. Dershowitz's present PR claim that Roberts' lawyers disbelieved their client, and that Roberts intentionally committed perjury as part of an extortion scheme, is just another Dershowitz lie. His reliance on statements taken out of context, his failure to include the statements of Roberts' lawyer after Dershowitz's supposed evidence had been investigated, and the damning admissions of his own lawyers, reveal Dershowitz's total lack of support for his allegation that Roberts and her lawyers concocted knowingly false allegation against him as part of a supposed extortion plot.

80. Dershowitz also lied to attempt to deflect Sarah Ransome's revelations about him. Ms. Ransome revealed that during the time she was a victim of Epstein's sex trafficking, Epstein's arranged for his lawyer, Dershowitz, to also represent Ms. Ransome. Ms. Ransome also described how, during the time Dershowitz was her lawyer, Epstein lent her out to Dershowitz for sex. (Exhibit 14).

81. Dershowitz asserted that he never had sex with Ms. Ransome, that he never represented Ms. Ransome, that he did not even know Ms. Ransome, and that Ms. Ransome's statements about him were fabricated by Ms. Roberts' lawyer in retaliation for a bar complaint that Dershowitz had filed against that lawyer (Exhibit 16). However, as Dershowitz knew:

(a) He did have sex with Ms. Ransome.

(b) He was Ms. Ransome's lawyer.

(c) Ms. Ransome's statements about her involvement with Dershowitz preceded any contact with Roberts' attorneys. For example, Ransome's first contact with any of Roberts' lawyers was in November 2016, and at least as early as October 2016 Ransome had identified Dershowitz in writing to a reporter as someone who had had sex with one or more of the girls provided by Epstein and that Epstein had arranged for Dershowitz to be Ransome's lawyer.

82. After settling the case against him brought by Messrs. Edwards and Cassell, Dershowitz told the media he had been vindicated, while at the same time insisting that the term of the settlement remains confidential. Edwards and Cassell responded: "Following the announcement of the settlement of defamation claims against Alan Dershowitz, he has been making public statements suggesting that he has prevailed in the lawsuit and that the terms of the settlement exonerate him of any wrongdoing. Those statements are at best misleading. It is a mistake for anyone to conclude based upon Mr. Dershowitz's statements that the case against him was abandoned due to lack of factual support. It is a mistake for anyone to conclude based upon Dershowitz's statements that Bradley Edwards and Paul Cassell had determined that the allegations against Alan Dershowitz made by Virginia Roberts Giuffre were false or unfounded. Neither the terms of settlement nor the agreed upon joint public statement issued as part of the settlement support any such conclusion and it is false to state or suggest otherwise." *Dershowitz Settles Sex Case, But is He Vindicated*? The American Lawyer, April 10, 2016.

83. Dershowitz continues to this day to insist that the terms of his settlement with Edwards and Cassell remain confidential -- a position that can only be explained by

Dershowitz's knowledge that revealing how much he had paid to avoid a trial of the allegations against him would reveal his guilt.

84. As described above, Dershowitz has also repeatedly asserted that he wanted to have a trial to establish his innocence. By contrast, he paid to settle the case that would have provided that trial. He even lied about his being willing to waive the statute of limitations so that Roberts could sue him for sex abuse -- a lie almost immediately exposed when he was promptly asked to do so and, equally promptly refused.

COUNT I DEFAMATION

85. Plaintiff Roberts re-alleges paragraphs 1 – 84 as if the same were fully set forth herein. Dershowitz made his false and defamatory statements deliberately and maliciously with the intent to intimidate, discredit and defame Roberts.

86. In December 2018, and thereafter, Dershowitz, on behalf of himself and Epstein, intentionally and maliciously released to the press his false statements about Roberts in an attempt to destroy Roberts' reputation and brand her as a liar and cause her to lose all credibility in her efforts to help victims of sex trafficking.

87. Dershowitz and Epstein knew that Dershowitz's assertions would dilute, discredit, and neutralize Roberts's public and private messages to sexual abuse victims and ultimately prevent Roberts from effectively providing assistance and advocacy on behalf of other victims of sex trafficking, or expose her abusers.

88. Using his role as a powerful lawyer with powerful friends, Dershowitz's statements were published internationally for the malicious purpose of further damaging a sexual abuse and sexual trafficking victim; to destroy Roberts's reputation and credibility; to cause the

world to disbelieve Roberts; and to destroy Roberts's efforts to use her experience to help others suffering as sex trafficking victims.

89. Dershowitz, personally, intentionally, and maliciously made false and damaging statements of fact concerning Roberts, as detailed above, in the Southern District of New York and elsewhere.

90. The false statements that Dershowitz made, personally on behalf of himself and Epstein not only called Roberts's truthfulness and integrity into question, but also exposed Roberts to public hatred, contempt, ridicule, and disgrace.

91. At the time Dershowitz made his false statements, he and Epstein, knew full well that they were completely false.

92. Dershowitz's false statements constitute libel, as he and Epstein knew that they were going to be transmitted in writing, widely disseminated on the internet and in print. Dershowitz intended his false statements to be published by newspaper and other media outlets internationally, and they were, in fact, published globally, including within the Southern District of New York.

93. Dershowitz's false statements constitute libel per se, including that they accused her of a crime, and including that they exposed Roberts to public contempt, ridicule, aversion, and disgrace, and induced an evil opinion of her in the minds of right-thinking persons.

94. Dershowitz's false statements also constitute libel per se, inasmuch, among other reasons, as they tended to injure Roberts in her professional capacity as the president of a non-profit corporation designed to help victims of sex trafficking, and inasmuch as they destroyed her credibility and reputation among members of the community that seeks her help and that she seeks to serve.

95. Dershowitz's false statements directly stated and also implied that in speaking out against sex trafficking Roberts acted with fraud, dishonesty, and unfitness for the task. Dershowitz's false statements directly and indirectly assert that Roberts lied about being sexually trafficked and abused by Epstein and having sex with Dershowitz, and that Roberts committed the crimes of perjury and extortion. Dershowitz's false statements were reasonably understood by many persons who read his statements as conveying that specific intention and meaning.

96. Dershowitz's false statements were reasonably understood by many persons who read those statements as making specific factual claims that Roberts was lying about specific facts, and committed the crimes of perjury and extortion.

97. Dershowitz specifically directed his false statements at Roberts' true public description of factual events, and many persons who read Dershowitz's statements reasonably understood that those statements referred directly to Roberts' account of the abuse she suffered at the hands of Epstein and Dershowitz.

98. Dershowitz and Epstein intended Dershowitz's false statements to be widely published and disseminated on television, through newspapers, by word of mouth, and on the internet. As intended by Dershowitz and Epstein, Dershowitz's statements were published and disseminated around the world.

99. Dershowitz made his false statements on behalf of himself and Epstein in reckless disregard of their truth or falsity and with malicious intent to destroy Roberts's reputation and credibility; to prevent her from further disseminating her life story; and to cause persons hearing or reading Roberts's descriptions of truthful facts to disbelieve her entirely. Dershowitz made his false statements on behalf of himself and Epstein wantonly and with the specific intent to maliciously damage Roberts's good name and reputation in a way that would destroy her efforts

to administer her non-profit foundation, or share her life story, and thereby help others who have suffered from sexual abuse.

100. As a result of Dershowitz's and Epstein's campaign to spread false, discrediting, and defamatory statements about Roberts, Roberts suffered substantial damages in an amount to be proven at trial.

101. Dershowitz's false statements have caused, and continue to cause, Roberts economic damage, psychological pain and suffering, mental anguish and emotional distress, and other direct and consequential damages and losses.

102. Dershowitz's and Epstein's campaign to spread his false statements nationally and internationally was unusual and particularly egregious conduct. Dershowitz and Epstein sexually abused and trafficked Roberts, conspired to avoid having these crimes properly prosecuted and discovered, and wantonly and maliciously set out to falsely accuse, defame, and discredit Roberts to deny and conceal the scope and scale of their crimes. In so doing, Dershowitz's efforts constituted a public wrong by deterring, damaging, and setting back Roberts' efforts to help victims of sex trafficking. Accordingly, this is a case in which exemplary and punitive damages are appropriate.

103. Punitive and exemplary damages are necessary in this case to deter Dershowitz, Epstein and others from wantonly and maliciously using a campaign of lies to discredit Roberts and other victims of sex trafficking.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Roberts respectfully requests judgment against Defendant Dershowitz, awarding compensatory, consequential, exemplary, and punitive damages in an

amount to be determined at trial, but in excess of the $75,000 jurisdictional requirement; costs of suit; attorneys' fees; and such other and further relief as the Court may deem just and proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all causes of action asserted within this pleading.

Dated: April 16, 2019.

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EXHIBIT 1

Even from jail, sex abuser manipulated the system. His victims were kept in the dark

BY Julie K. Brown
NOV. 28, 2018

PERVERSION of JUSTICE

A decade before #MeToo, a multimillionaire sex offender from Florida got the ultimate break.

Palm Beach County Courthouse

June 30, 2008

Jeffrey Edward Epstein appeared at his sentencing dressed comfortably in a blue blazer, blue shirt, jeans and gray sneakers. His attorney, Jack Goldberger, was at his side.

At the end of the 68-minute hearing, the 55-year-old silver-haired financier — accused of sexually abusing dozens of underage girls — was fingerprinted and handcuffed, just like any other criminal sentenced in Florida.

But inmate No. W35755 would not be treated like other convicted sex offenders in the state of Florida, which has some of the strictest sex offender laws in the nation.

Ten years before the #MeToo movement raised awareness about the kid-glove handling of powerful men accused of sexual abuse, Epstein's lenient sentence and his extraordinary treatment while in custody are still the source of consternation for the victims he was accused of molesting when they were minors.

Beginning as far back as 2001, Epstein lured a steady stream of underage girls to his Palm Beach mansion to engage in nude massages, masturbation, oral sex and intercourse, court and police records show. The girls — mostly from disadvantaged, troubled families — were recruited from middle and high schools around Palm Beach County. Epstein would pay the girls for massages and offer them further money to bring him new girls every time he was at his home in Palm Beach, according to police reports.

The girls, now in their late 20s and early 30s, allege in a series of federal civil lawsuits filed over the past decade that Epstein sexually abused hundreds of girls, not only in Palm Beach, but at his homes in Manhattan, New Mexico and in the Caribbean.

In 2007, the FBI had prepared a 53-page federal indictment charging Epstein with sex crimes that could have put him in federal prison for life. But then-Miami U.S. Attorney Alexander Acosta signed off on a non-prosecution agreement, which was negotiated, signed and sealed so that no one would know the full scope of Epstein's crimes. The indictment was shelved, never to be seen again.

Epstein instead pleaded guilty to lesser charges in state court, and was required to register as a sex offender. He was sentenced to 18 months incarceration.

But Epstein — who had a long list of powerful, politically connected friends — didn't go to state prison like most sex offenders in Florida. Instead, the multimillionaire was assigned to a private wing of the Palm Beach County stockade, where he was able to hire his own security detail. Even then, he didn't spend much time in a cell. He was allowed to go to his downtown West Palm Beach office for work release, up to 12 hours a day, six days a week, records show.

Read Next

LOCAL

Sex abuser Jeffrey Epstein was surrounded by powerful people. Here's a sampling

He was permitted to hire his own private psychologist for his required sex-offender counseling, and after his release from jail, his subsequent year of probation under house arrest was filled with trips on his corporate jet to Manhattan and to his home in the U.S. Virgin Islands — all approved by the courts with no objections from the state.

On the morning of his sentencing in 2008, none of Epstein's victims were in the courtroom to protest his soft jail term or the unusual provisions of his incarceration and probation — and that was by design.

Palm Beach multimillionaire Jeffrey Epstein is a free man, despite sexually abusing dozens of underage girls according to police and prosecutors. His victims have never had a voice, until now.

By

Emails and letters contained in court filings reveal the cozy, behind-the-scenes dealings between federal prosecutors and Epstein's indomitable legal team during the run-up to his federal plea deal, as they discussed ways to minimize his criminal charges and avoid informing the girls about the details of the deal until after the case was resolved.

That arrangement benefited Epstein in a number of ways. Unlike other high-profile sex crime cases, federal prosecutors agreed to keep his sentencing quiet, thereby limiting media coverage. His underage victims — identified in FBI documents — weren't told about the plea deal so they weren't in court, where they could voice their objections and possibly sway the judge to give Epstein a harsher sentence or reject the agreement altogether.

Most important, Epstein's crimes would be reduced to felony prostitution charges, giving him the ability to argue that the girls weren't victims at all — they were prostitutes.

Four accomplices named in Epstein's non-prosecution agreement — Nadia Marcinkova, Sarah Kellen, Adriana Ross and Lesley Groff — were also given immunity from federal prosecution. Marcinkova was a young girl when Epstein brought her from Yugoslavia to live with him. Several victims told police that she was involved in orgies with Epstein and underage girls. Ross, Groff and Kellen, now known by her married name, Vickers, were schedulers who arranged his underage sex sessions, according to the FBI and police.

Marcinkova and Kellen, through their attorneys, declined to comment for this story. The Herald was unsuccessful in reaching Ross and Groff.

Acosta, who is now President Donald Trump's secretary of labor, told lawmakers last year at his confirmation hearing that he did not know that Epstein would receive such liberal treatment while incarcerated. But court records show that federal prosecutors under his authority acquiesced to many of Epstein's demands, including that he not go to federal or state prison.

"I can't remember how I found out that he had taken a plea,'' said Courtney Wild, identified by the FBI as one of more than three dozen underage girls — some of them as young as 13 — who had been molested by Epstein at his waterfront estate between 2001 and 2005.

"We were purposefully misled into believing that his sentencing [in state court] had nothing to do with the federal crimes he committed against me or the other girls.''

Epstein, now 65, was released in 2009 after serving 13 months.

Wild, who was 14 when she met Epstein, is suing the federal government, alleging that prosecutors kept her and other victims in the dark as part of a conspiracy to give Epstein — described in the lawsuit as "a powerful, politically connected multimillionaire" — one of the most lenient deals for a serial child sex offender in history.

Courtney Wild is suing the federal government, claiming that prosecutors deliberately kept her and other victims of Jeffrey Epstein in the dark about the status of his case. The U.S. Attorney's Office signed a non-prosecution agreement with the multimillionaire. Emily Michot *EMICHOT@MIAMIHERALD.COM*

Now 31, Wild is Jane Doe No. 1 in "Jane Doe 1 and Jane Doe 2 vs. the United States," which seeks to overturn Epstein's plea agreement on the grounds that it was executed in violation of the federal Crime Victims' Rights Act. The measure affords crime victims a series of rights, including to confer with prosecutors and to be notified about plea negotiations and sentencing.

That lawsuit — and an unrelated state court case scheduled for trial on Dec. 4 — could expose more about Epstein's crimes, as well as who else was involved and whether there was any undue influence that tainted the federal case.

Support investigative journalism

The Miami Herald obtained thousands of FBI and court records, lawsuits, and witness depositions, and went to federal court in New York to access sealed documents in the reporting of "Perversion of Justice." The Herald also tracked down more than 60 women who said they were victims, some of whom had never spoken of the abuse before.

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Some of Epstein's victims will finally have an opportunity to testify for the first time as part of the Dec. 4 case in state court in Palm Beach County. It pits Fort Lauderdale attorney Bradley Edwards against Epstein, who had accused Edwards of malfeasance in his representation of several victims.

Jack Scarola, the attorney representing Edwards, said Epstein should be held accountable for his unrelenting attacks against Edwards — as well as others who were involved in his case.

"We are going to demonstrate through this case that no one — no matter how much money they have — can abuse children and then attempt to bully those who come to the defense of children,'' said Scarola, a former state prosecutor.

Florida and beyond

Few people had as much insight into Epstein's lifestyle — and its international reach — as Virginia Roberts. By age 16, Roberts had lived a life that was beyond that of most high school girls.

At 11, she says, she was sexually molested by a family friend. At 12, she was smoking pot and skipping school. At 13, she was in and out of foster homes, and at 14, she was on the street.

In Miami, the runaway became a captive of a 65-year-old sex trafficker, Ron Eppinger. For months, she says, she was sexually abused, kept in an apartment and pimped out to pedophiles. After his indictment in 2000 on trafficking charges, Roberts returned to West Palm Beach and tried to heal.

Virginia Roberts, now Giuffre, says she was 16 and working as a locker room attendant at Donald Trump's Mar-a-Lago resort when she was approached by Ghislaine Maxwell, Jeffrey Epstein's associate, about becoming a masseuse for Epstein. *COURTESY OF VIRGINIA ROBERTS*

That summer, when Roberts was 16, she said her father helped her get a job as a locker room attendant at the spa at Donald Trump's Mar-a-Lago resort in Palm Beach, records show. Her father worked at the resort as a maintenance man.

There she said she met Ghislaine Maxwell, an Epstein friend and socialite daughter of the late British publishing magnate Robert Maxwell. She offered Roberts an opportunity to become a massage therapist, working for Epstein.

In a sworn court affidavit and in a recent interview with the Herald, Roberts described how Epstein and Maxwell began grooming her — not just to perform massages, but to sexually pleasure them and others.

"It started with one and it trickled into two and so on," Roberts told the Herald. "And before you know it, I'm being lent out to politicians and academics and royalty."

Roberts, too, was ordered to find Epstein girls — the younger, the better — by trolling areas where teenagers congregated, such as shopping malls, to lure girls to whatever residence Epstein was staying in at the time, she told the Herald.

She began to travel with Epstein and Maxwell to Epstein's other homes, in New York, New Mexico and the U.S. Virgin Islands — and her trips are documented in flight logs that frequently list her name or her initials as a passenger, court records show.

"His appetite was insatiable. He wanted new girls, fresh, young faces every single day — that was just the sickness that he had," Roberts said.

Neither Epstein nor his lead attorney, Goldberger, responded to requests for comment.

Roberts alleges that Epstein had cameras throughout his homes and said he liked her to tell him about the sexual peccadilloes of various important men she had sex with.

"Epstein and Maxwell also got girls for Epstein's friends and acquaintances. Epstein specifically told me that the reason for him doing this was so that they would 'owe him,' they would 'be in his pocket,' and he would 'have something on them,' " Roberts said in a court affidavit. "I understood him to

mean that when someone was in his pocket, they owed him favors.''

Roberts elaborated in her interview with the Herald, saying that Epstein had access to girls through a modeling agency that recruited them from overseas.

Epstein, who was close to Les Wexner, the owner of Victoria's Secret, often talked about his connections to people in the modeling, fashion and acting industries, Roberts told the Herald.

"He [Epstein] would tell the girls, 'Hey, I will give you a modeling contract if you go have sex with this man [whichever acquaintance Epstein designated],' '' she said.

Roberts' story about the modeling agency is supported, to a degree, by the sworn statement of a Miami woman named Maritza Vasquez, who was later interviewed in New York by an FBI agent from Miami. Vasquez worked as a bookkeeper for Mc2, owned by Epstein associate Jean-Luc Brunel. He employed scouts in South America, Europe and the former Soviet Union to find him models to bring to the United States, Vasquez said in a 2010 sworn court deposition obtained by the Herald.

Vasquez stated in the deposition that from 2003 to 2006 she handled all the finances and payroll for the agency, including a bank transaction involving Epstein. She said Epstein invested $1 million in Mc2.

The models were often very young — 13, 14 and 15 — and some of them were housed in apartments at 301 E. 66th St. in New York, a building purportedly owned by Epstein, the deposition said.

Epstein didn't charge the girls rent, Vasquez said, but Brunel charged them $1,000 a month, with four of them at a time sharing one apartment. The girls who were the youngest and most beautiful stayed at the 66th Street apartments, which were more luxurious than the other apartments that were used to house models who were not as young and desirable, she said.

Vasquez once let one of the models, who was 14, stay overnight with her after the girl ran into trouble with police for trying to get into a Manhattan nightclub. Vasquez also testified that she helped a lawyer obtain visas for the foreign models, and assisted with their transportation to and from modeling assignments and parties.

Vasquez said that even though the agency employed 200 to 300 models, the company didn't make any money and Brunel was always broke. Brunel would later sue Epstein, alleging that the financier's sex scandal had caused his business to fail, but the suit was eventually dropped.

Vasquez testified it wasn't unusual for the agency to send girls to an assignment with a wealthy client for $100,000 or more, but the girl wouldn't be paid the full amount — or anything at all — if she refused to be "molested.''

Vasquez considered herself a mother figure and often coached the youngest girls to stick to the 9-to-5 modeling assignments because she didn't think it was appropriate for them to be having sex.

She said she met Epstein only once, but she often helped arrange for girls — many of them underage — to be sent to his homes in New York, Palm Beach and his island in the Caribbean for parties. She heard salacious rumors about Epstein's parties, but testified she had no firsthand knowledge about whether they involved sex.

Vasquez said that she was questioned by the FBI and she tried to tell agents where to look for evidence.

Vasquez was eventually let go from the agency after she was accused of stealing money — money she claims was given to her by Brunel. Vasquez said she was placed on probation for the theft. She never heard from the FBI about Epstein again.

The Herald was unsuccessful in reaching Brunel through his former attorney.

In a written statement released in 2015, Brunel denied any involvement in trafficking underage models.

"I strongly deny having participated, neither directly nor indirectly, in the actions Mr. Jeffrey Epstein is being accused of," he said. "I strongly deny having committed any illicit act or any wrongdoing in the course of my work as a scouter or model agencies manager."

Too old at 19

In 2003, when Roberts turned 19, it was clear that Epstein had lost interest because she was too old for him, she said. She convinced him to pay for her to get training to become a real professional masseuse so that she could move on.

In an interview, she explained that Epstein arranged for her to take a class in Thailand, but it came with a hitch: She said she was instructed to pick up a Thai girl he had arranged to come to the States.

Roberts, who showed the Herald the written instructions for the rendezvous, never picked up the girl because Roberts met a man on the trip who would become her husband. The couple married and moved to Australia, where they currently live.

In 2007 — at the same time the FBI was investigating Epstein — Roberts, pregnant with her second child, said she unexpectedly received phone calls from Maxwell and Epstein. She said they were worried that she had told police about them. She assured them she had not spoken to anyone, she said.

Shortly afterward, Roberts said, she was contacted by someone who claimed to be with the FBI. But she was afraid to tell that person details, fearing it was really an Epstein associate posing as an FBI agent.

That agent, identified in court papers as Timothy Slater, confirmed that he and the other agent on the case, Nesbitt Kuyrkendall, called Roberts in January or February 2007. In a sworn statement, Slater said he informed Roberts that they suspected she was a victim of Epstein's.

The agent said Roberts answered basic questions, but became uncomfortable and "asked that I not bother her again."

Roberts said the agent didn't try too hard to convince her to talk, and she was surprised when he hung up after asking her a few graphic questions about her sex life. She said she was suspicious, but would have cooperated had the FBI talked to her in person and explained why they were asking about Epstein.

"I was still scared to death," Roberts said. "Jeffrey used to tell me that he owned the entire Palm Beach Police Department. I just didn't want my family harmed."

She nevertheless was listed by federal prosecutors as one of Epstein's Palm Beach victims.

As the years went by and Roberts had a daughter, she would be haunted by a fear that Epstein was still taking advantage of young girls. In 2011, she went public in a paid interview with a British tabloid, the Daily Mail, asserting that she had had sex with Prince Andrew, one of Epstein's friends, several times when she was a teen.

In her 2015 affidavit, she discussed in detail some of her alleged sex encounters with the prince and Epstein's other friends, including lawyer Alan Dershowitz. Edwards included the affidavit in the court file as part of the Jane Does' Crime Victims' Rights Act case, at which time it became public.

Virginia Roberts says she was loaned out by Jeffrey Epstein to his friend Prince Andrew, shown here. He denies they had sex. *COURTESY OF VIRGINIA ROBERTS*

In the affidavit, Roberts claimed that Epstein and Maxwell directed her to have sex with Andrew and Dershowitz and others. She had sex with Andrew three times, she alleged — once in London, when she was 17, again in New York, when she was 17, and a third time, as part of an orgy on Epstein's island, when she was 18. By law, at 17, she would have been above the age of consent in New York and England, but not in Florida, where the age of consent is 18.

As part of the affidavit, Roberts furnished a photograph of her with the prince and Maxwell, which she said was taken in London.

Dershowitz, who was part of Epstein's criminal defense team, was often a guest at Epstein's homes, she said.

"I had sexual intercourse with Dershowitz at least six times,'' Roberts wrote in the 2015 court affidavit. "The first time was when I was about 16, early on in my servitude to Epstein and it continued until I was 19.'' She detailed some of those alleged trysts, which she said happened at Epstein's homes in Palm Beach, New Mexico and on Epstein's island.

One of Epstein's housemen, Juan Alessi, testified in a 2009 sworn deposition that Dershowitz visited Epstein's Palm Beach home four or five times a year. He said that Roberts was a frequent visitor as well, but he never placed Dershowitz and Roberts at the house at the same time.

Alessi, who testified he worked for Epstein from 1999 to 2002, said there were often young girls who gave massages at the house, even in the middle of the night. But he said he never checked their ages, and only knew one girl for certain who was underage, because he had picked her up from high school. That girl, who is now an actress, was not one of Epstein's masseuses, Alessi said.

He also said he was Maxwell's driver, and he recalls waiting outside of Mar-a-Lago the day Maxwell met Roberts. He testified he saw Maxwell talking to Roberts and recalls Roberts coming to Epstein's mansion later that day. One of Alessi's jobs was to drive Maxwell to various spas in Palm Beach where she left business cards in order to "recruit'' more masseuses, he said in the sworn deposition.

Dershowitz, Prince Andrew and Maxwell have long denied Roberts' allegations.

In an interview with the Herald, Dershowitz reiterated that he had never met Roberts, and never saw Epstein with any underage girls.

"The story was 100 percent flatly categorically made-up,'' he said, adding that Roberts and her attorneys fabricated the assertion in order to get money from other powerful, wealthy people she alleges she had sex with.

"The only possible reason to accuse me in public and [them] in private is so she could get money,'' Dershowitz said.

Edwards and his co-counsel in the Crime Victims' lawsuit, University of Utah law professor Paul Cassell, sued Dershowitz for defamation and Dershowitz countersued in 2015. The case was settled out of court, with Dershowitz saying he had been vindicated.

Dershowitz said he received a massage at Epstein's Palm Beach home only once — but that it was just a regular, therapeutic massage by a masseuse — not by Roberts or anyone underage. Dershowitz's wife was there at Epstein's house at the time, Dershowitz said in the deposition taken for the case in 2015.

"I never had any knowledge of Jeffrey Epstein having any contact with any underage women — ever,'' Dershowitz told the Herald.

Edwards and Cassell admitted making a "tactical mistake" in filing the accusations against Dershowitz as part of a lawsuit not involving him. But they emphasized that the settlement had no bearing on the veracity of Roberts' allegations.

The judge for the Crime Victims' Rights Act lawsuit agreed that the affidavit was misplaced in that case, and it was dropped.

Prince Andrew's spokesman at Buckingham Palace did not respond to an email requesting comment.

Roberts, now 35, said it has taken her a long time to stand up to Epstein. She and 20 other victims received settlements from Epstein, ranging from $50,000 to more than $1 million. The exact amounts have been kept confidential.

"It takes so long until you are able to speak about it. It took me having a daughter and looking at this young, beautiful innocent baby to say I want to speak out about it now. I'm hoping that this will bring out more girls so that they say, Me Too.''

The state court hearing

The judge at Epstein's sentencing hearing at the Palm Beach County Courthouse knew very little about Epstein's crimes. The sentencing paperwork was restricted to Epstein's specific charges: one count of solicitation of prostitution and one count of procuring a person under the age of 18 for prostitution.

“Are there more than one victim?’’ Circuit Court Judge Deborah Dale Pucillo asked the prosecutor at Epstein’s sentencing on June 30, 2008.

“There’s several,’’ replied assistant state prosecutor Lanna Belohlavek.

“Are all the victims in both of these cases in agreement with the terms of this plea?‘‘ Pucillo later asked.

“Yes,‘‘ Belohlavek replied, telling the judge that she had spoken to “several” of Epstein’s victims.

Emails show that federal prosecutors didn’t want the judge to know how many victims and accomplices there were.

Federal prosecutor A. Marie Villafaña — in a September 2007 email to Epstein lawyer Jay Lefkowitz — said: “I will mention co-conspirators but I would prefer not to highlight for the judge all the other crimes and all the other persons that we could charge.’’

Attorney Spencer Kuvin happened to be in court that day because he’d heard Epstein was to appear, but Kuvin didn’t know why. He figured he’d use it as an opportunity to serve Epstein with civil court papers involving one of several victims he represented. Instead, he listened to what was happening and couldn’t believe that no one had contacted him or his clients.

“I was shocked to learn that the proceeding involved my client’s case and there was nothing I could do except watch as they disposed of her case without ever telling her,’’ Kuvin said.

At the hearing, Belohlavek and Epstein’s attorney, Goldberger, were in sync, the court transcript shows. Epstein would be required to register as a sex offender, but his probation would not be served under the strict requirements of sex offender probation.

Jeffrey Epstein is a registered sex offender in New York State and Florida. Emily Michot *EMICHOT@MIAMIHERALD.COM*

The judge didn’t question those provisions, but she did ask why Epstein was going to serve his sentence in the Palm Beach County stockade instead of in a Florida state prison, like most sex offenders.

After he pleaded guilty in state court, Jeffrey Epstein was assigned to a private section of the Palm Beach County stockade. Soon, however, he was allowed to leave the compound six days a week, 12 hours a day, for what was termed work release. Emily Michot *EMICHOT@MIAMIHERALD.COM*

"We just decided that was the best way to accomplish what needed to be done here and the parties agreed that that sentence satisfied everyone's requirements,'' Goldberger replied.

Said Judge Pucillo: "The taxpayers of Palm Beach County are going to pay 18 months to house this guy instead of DOC [the Department of Corrections]?"

Belohlavek: "Right.''

Pucillo did not respond to a request for comment on the case.

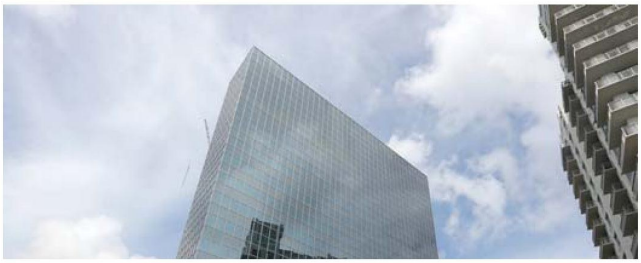
Villafaña, the lead federal prosecutor in Epstein's case, was in the courtroom, but there's no indication she objected to Epstein's cozier jail accommodations.

When he entered jail in July 2008, Epstein was arguably the most well-known inmate there. Records also show that Epstein hired Palm Beach sheriff's deputies for his security details, paying them for the hours they spent monitoring him on work release at his West Palm Beach office, where he often stayed until 10 p.m., jail logs show.

The Herald reviewed their time sheets, showing that the deputies logged visitors coming and going to and from his office throughout the day. A record log of his visitors was kept in a safe, but the log no longer exists, according to a spokeswoman for the Palm Beach County Sheriff's Office.

One deputy who often worked Epstein's detail said that his assignment was to stay in a front reception room of Epstein's office. Epstein was in a separate office — with the door closed — most of the day as he accepted visitors, both male and female, the deputies' logs show.

"It was not our job to monitor what he was doing in that office,'' the deputy, now retired, told the Herald.



In their early reports in July 2008, the deputies referred to Epstein as "inmate'' but within a few weeks the language had changed and he was called a "client." He was occasionally allowed to take a break for lunch by sitting outside in a park, the records show, and they also gave him permission to scout for a new office. While on work release, he was required to wear an ankle bracelet to monitor his whereabouts.

The work release was approved by the Palm Beach County Sheriff's Office, said spokeswoman Therese Barbera.

"Jeffrey Epstein, while in custody, met the criteria for the Work Release Program,'' Barbera wrote in an email. "There was no factual basis to deny Mr. Epstein the same availability of this program that is offered to other inmates under similar circumstances. Mr. Epstein was closely monitored and there were no problems encountered during his time in the program."

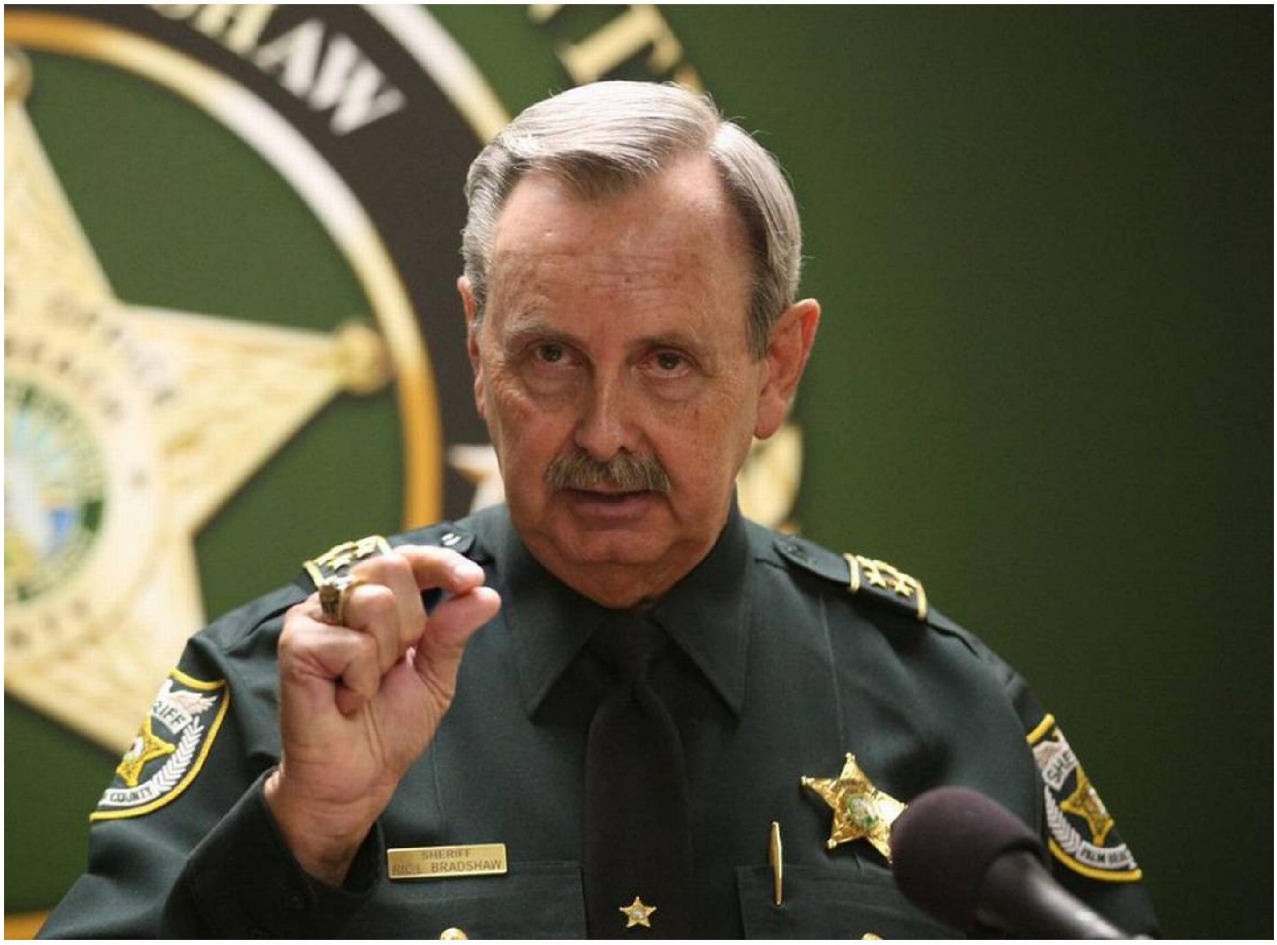
While officially confined to the Palm Beach County stockade, serving time for his sex offenses, Jeffrey Epstein was allowed to spend half his day at this West Palm Beach office building. It was called work release, although Palm Beach Sheriff's Office rules prohibit work-release status for sexual offenders. Emily Michot *EMICHOT@MIAMIHERALD.COM*

But the sheriff's own work release policy — a copy of which Barbera provided to the Herald — specifically notes that sex offenders aren't eligible for work release.

At first, Barbera questioned whether Epstein was a sex offender at all, noting that he didn't have to register officially until after his release from the jail in 2009. But his court papers clearly listed him as a sex offender. In fact, the papers Epstein signed — obtained by the Herald — included all the laws governing registered sex offenders in Florida.

Barbera refused to explain why Epstein was seemingly allowed to deviate from the agency's policies. She also would not respond to requests for an accounting of the amount of money that Epstein paid the sheriff's office for his private details.

Palm Beach Sheriff Ric Bradshaw, who has been in office since 2004 — and is widely considered to be one of the most powerful people in the county — did not respond to requests for comment.



A spokeswoman for Palm Beach County Sheriff Ric Bradshaw declined to say why Jeffrey Epstein was allowed work-release status despite rules prohibiting work release for sex offenders. Taylor Jones *PALM BEACH POST*

Epstein's registration requirements are somewhat confusing, even to those who are responsible for keeping his registration. The Florida Department of Law Enforcement, which keeps the online registry, and the Palm Beach County Sheriff's Office, where Epstein has to register in person twice a year, gave

conflicting explanations over the past six months about who is responsible for ensuring that he is complying with the law.

On Nov. 14, the Herald asked the sheriff's office for a full accounting of Epstein's check-ins for 2018. The record the office supplied two days later showed he registered in January and in July — as required. But PBSO also inexplicably had him registering on Nov. 14 — the very same day that the Herald asked for the records from the sheriff's office.

When asked about this sudden registration, Barbera replied: "The information we provided you was a snapshot from the FDLE website. Perhaps, someone from FDLE can provide a reason for you.''

Said FDLE spokeswoman Gretl Plessinger in an email: "The screenshot is not on the public registry. This is information inputted by the local agency when the offender comes into the local sheriff's office to register.''

Plessinger said Epstein is not covered by the state's new three-day rule, which requires sex offenders to re-register when they come to stay in Florida for three days or more. His town of Palm Beach home is already on file, as a temporary residence, she said.

So it's not clear why he would have suddenly registered a third time on Nov. 14.

State Sen. Lauren Book, a child sex abuse survivor and vocal advocate for tough sex offender monitoring, called the case an appalling example of how those in the justice system allow wealthy people to skirt the law and bend the rules.

"These prosecutors, and judges and sheriffs who are making these decisions and allowing things to fly — we have to hold these people accountable. They are supposed to uphold the law — regardless of who a person is and how much money they have in the bank or who they had on their airplane.''

Piece by piece

Over the years, Courtney Wild, Virginia Roberts and more than a dozen other women who say they were victims of Epstein have been quietly challenging the traditional legal norms that have failed to punish Epstein and other men in positions of power for sexual abuse.

Epstein has paid millions of dollars in civil compensation that, for the most part, has kept the details about his operation out of the public eye. As a result, much — but not all — of the testimony and evidence collected as part of the vast litigation has been sealed or redacted from public court records.

The girls who were abused by Jeffrey Epstein and the cops who championed their cause remain angry over what they regard as a gross injustice, while Epstein's employees and those who engineered his non-prosecution agreement have prospered.

By

Taking a page from Epstein's legal team, lawyers representing Epstein's victims hired private investigators and former police detectives to dig into Epstein's life. Over the past decade, they've tracked down hundreds of people, including dozens of other potential victims; they've interviewed Epstein's recruiters, bookkeepers, housekeepers, butlers, pilots and drivers. They've traveled around the country and the world, taking statements and sworn depositions, coaxing people to talk who had previously been too reticent to come forward.

In short, they did what criminal prosecutors didn't do.

Some of the information they've learned was given to federal authorities in New York. Edwards said those authorities have shown no interest in opening a new investigation focused on crimes he is alleged to have committed in that state, where he is listed as a level 3 sex offender, the most dangerous category, considered at risk to re-offend, records show. In New York, he has to register every 90 days.

Virginia Roberts holds a photo of herself at age 16, when she says Palm Beach multimillionaire Jeffrey Epstein began abusing her sexually. Emily Michot *EMICHOT@MIAMIHERALD.COM*

Holding abusers accountable

In 2015, Roberts sued Maxwell for defamation in New York after Maxwell called her a liar in a news interview. The civil lawsuit was an effort by Roberts not just to clear her name, but an attempt to prove that Epstein and Maxwell operated an international underage sex trafficking operation. The lawsuit was settled out of court in 2017 and nearly all the evidence presented in the case has been sealed.

Roberts' attorney, Sigrid McCawley, claims that Roberts received a sizable settlement, although the amount is confidential.

"She wanted to hold her abusers accountable and we were able to do that by bringing this case ... which we ultimately settled very successfully for her,'' said McCawley, an associate of noted Bush-Gore recount lawyer David Boies, who has also pursued cases against Epstein in federal court in New York.